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No. 08-26

In The Supreme Court of the United States

SAKAR INTERNATIONAL, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

James C. Tuttle
Counsel of Record
TUTTLE LAW OFFICES
82 Wall Street, Suite 1105
New York, New York 10005
(212) 742-7965

Counsel for Petitioner

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax (202) 955-0022 • www.thelexgroupdc.com

QUESTIONS PRESENTED FOR REVIEW

Whether the Court's 1988 *Kmart v. Cartier* "embargo" jurisdictional holding permits subject matter jurisdiction to the Court of International Trade under 28 U.S.C. § 1581(i)(3) and (4) where Customs' mandated exclusion by import seizure of counterfeit goods is statutorily compulsory Government embargo action under 19 U.S.C. § 1526 (e) without any pre-requisite trademark owner action.

The question should be answered in the affirmative.

Whether subject matter jurisdiction to the Court of International Trade exists under 28 U.S.C. § 1581(i)(1) and (4) where the present non-monetary judicial review claim case nevertheless "arises out of" a "law providing for ... revenue from imports," the Tariff Act of 1930.

The question should be answered in the affirmative.

Whether the strong presumption of judicial review of administrative agency action authorized under the Constitution Article III, Section 2, and the Court's long standing judicial review precedents is available as to this case where Customs' unauthorized, *ultra vires* fictionalized-MSRP Penalty Decision agency HQ findings of fact and conclusions of law will otherwise never be subjected to appropriate national-scope judicial review or supervision.

The question should be answered in the affirmative.

CORPORATE DISCLOSURE STATEMENT CERTIFICATE OF INTEREST

Counsel for the petitioner certifies the following:

1. The full name of every party represented by me is: Sakar International, Inc.

2. The name of the real party in interest represented by me is: (not applicable).

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by me are: (not applicable).

4. There is no such corporation as listed in paragraph 3.

5. The names of all law firms and partners or associates that appeared for the party now represented by me in this case or are expected to appear in this court are: Tuttle Law Offices, James C. Tuttle, Esq., 82 Wall Street, Suite 1105, New York, NY 10005.

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The opinion of the U.S. Court of Appeals for the Federal Circuit ["CAFC"] dated February 19, 2008, is officially reported at *Sakar International, Inc. v. United States*, 516 F.3d 1340 (Fed. Cir. 2008) ("*Sakar*"), and is reproduced at App. 1-23.

The Order of the CAFC dated April 11, 2008, denying Petitioner's requests for Rehearing and Rehearing *En Banc*, is reproduced at App. 64.

The opinion of the U.S. Court of International Trade ["CIT"] dated December 12, 2006, is officially reported at *Sakar International, Inc. v. United States*, 466 F. Supp. 2d 1333 (CIT 2006), and is reproduced at App. 24-63.

JURISDICTION

The Petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.3 because it is being filed within 90 days following the April 11, 2008, CAFC denial of a timely filed petition for rehearing. The Court has jurisdiction to review the February 19, 2008 judgment of the Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant Constitutional and statutory provisions involved in this case are: Article III, Section 2, U.S. Constitution; 28 U.S.C. § 1581(i)(1),

(3), and (4); 19 U.S.C. § 1526(a), (e) and (f); and 15 U.S.C. § 1124.

Article III, Section 2, U.S. Constitution:

Section 2. The judicial power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects, * * *

28 U.S.C. § 1581(i)(1), (3), and (4):

Civil actions against the United States and agencies and officers thereof:

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)—(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

* * *

(3) embargoes or other quantitative restrictions on the importation of merchandise for resale other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)—(3) of this subsection and subsections (a)—(h) of this section.

19 U.S.C. § 1526(a), (e), and (f):

(a) Except as provided in subsection (d) of this section, it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States, under the provisions of sections 81 to 109 of Title 15, and if a copy of the certificate of registration of such trademark is filed with the Secretary of the Treasury, in the manner provided in section 106 of said Title 15, unless written consent of the owner of such trademark is produced at the time of making entry.

* * *

(e) Merchandise bearing counterfeit mark; seizure and forfeiture disposition of seized goods

Any such merchandise bearing a counterfeit mark (within the meaning of section 1127 of Title 15) imported into the United States in violation of the provisions of section 1124 of Title 15, shall be seized and, in the absence of the written consent of the trademark owner, forefeited for violations of the customs laws. Upon seizure of such merchandise, the Secretary shall notify the owner of the trademark, and shall, after forfeiture, destroy the merchandise. Alternatively, if the merchandise is not unsafe or a hazard to health, and the Secretary has the consent of the trademark owner, the Secretary may obliterate the trademark where feasible and dispose of the goods seized—

(1) by delivery to such Federal, State, and local government agencies as in the opinion of the Secretary have a need for such merchandise,

(2) by gift to such eleemosynary institutions as in the opinion of the Secretary have a need for such merchandise, or

(3) more than 90 days after the date of forfeiture, by sale by the Customs Service at public auction under such regulations as the Secretary prescribes, except that before making any such sale the Secretary shall determine that no Federal, State, or local government agency or eleemosynary

institution has established a need for such merchandise under paragraph (1) or (2).

(f) Civil penalties

(1) Any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise for sale or public distribution that is seized under subsection (e) of this section shall be subject to a civil fine.

(2) For the first such seizure, the fine shall not be more than the value of that the merchandise would have had if it were genuine, according to the manufacturer's suggested retail price, determined under regulations promulgated by the Secretary.

(3) For the second seizure and thereafter, the fine shall be not more than twice the value that the merchandise would have had if it were genuine, as determined under regulations promulgated by the Secretary.

(4) The imposition of a fine under this subsection shall be within the discretion of the Customs Service, and shall be in addition to any other civil or criminal penalty or other remedy authorized by law.

15 U.S.C. § 1124:

Importation of goods bearing infringing marks or names forbidden

Except as provided in subsection (d) of section 1526 of Title 19, no article of imported merchandise which shall copy or simulate the name of any domestic manufacture, or manufacturer, or trader, or of any manufacturer or trader located in any foreign country which, by treaty, convention, or law affords similar privileges to citizens of the United States, or which shall copy or simulate a trademark registered in accordance with the provisions of this chapter or shall bear a name or mark calculated to induce the public to believe that the article is manufactured in the United States, or that it is manufactured in any foreign country or locality other than the country or locality in which it is in fact manufactured, shall be admitted to entry at any customhouse of the United States; and, in order to aid the officers of the customs in enforcing this prohibition, any domestic manufacturer or trader, and any foreign manufacturer or trader, who is entitled under the provisions of a treaty, convention, declaration, or agreement between the United States and any foreign country to the advantages afforded by law to citizens of the United States in respect to trademarks and commercial names, may require his name and residence, and the name of the locality in which his goods are manufactured, and a copy of the certificate of registration of his trademark, issued in accordance with the provisions of this chapter, to be recorded in books which shall be kept for this purpose in the Department of the Treasury, under

such regulations as the Secretary of the Treasury shall prescribe, and may furnish to the Department facsimiles of his name, the name of the locality in which his goods are manufactured, or of his registered trademark, and thereupon the Secretary of the Treasury shall cause one or more copies of the same to be transmitted to each collector or other proper officer of customs.

STATEMENT OF THE CASE

Basis for Federal Jurisdiction in the court of first instance, the CIT:

28 U.S.C. § 1581(i)(1), (3), and (4), "revenue" law and "embargo" law administration and enforcement.

This case seeks judicial review of a U. S. Customs and Border Protection ["Customs"] Headquarters ["HQ"] *ultra vires* penalty remedy. This is not a seizure action or a trademark action; it is an action for judicial review and declaratory judgment as to an agency wrongful penalty remedy. No material facts are in dispute. The core issue, and purpose, of the case is to obtain review by the CIT to declare legally invalid a final Customs HQ fictionalized-"MSRP"[1] $67,775 Penalty Decision remedy that was imposed upon Petitioner Sakar on December 29, 2005, following two formal HQ administrative reviews by agency head officers.[2]

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[1] [abbreviation for "Manufacturer's Suggested Retail Price"]

[2] The original fictionalized-"MSRP" Penalty was claimed by Customs to be $381,500 in amount.

Customs wrongly imposed, and twice maintained with fully-briefed HQ deliberations and ruling-opinions, the *ultra vires* fictionalized-MSRP Penalty under 19 U.S.C. § 1526(f) following an embargo seizure and goods destruction by Customs under 19 U.S.C. § 1526(e).

Customs has no statutory authority basis to impose an "MSRP" Penalty in this case, and moreover has not promulgated any § 1526(f)-required agency regulation for determination of MSRP. Also no MSRP factually exists for the subject import goods[3] themselves or for any similar goods, as attested in un-opposed affidavits of the Chief Operating Officer of petitioner Sakar. No MSRP exists or ever existed here in the marketplace or elsewhere.

The agency thus has exceeded the metes and bounds of its § 1526(f) authority, and indeed has changed its purported wholly fictionalized, non-existent "MSRP" several times within this case.

The agency has throughout its two HQ penalty review proceedings over 2½ years, steadfastly declined to utilize Customs' appropriate and lawful non-MSRP penalty authority that it properly still has under 19 U.S.C. § 1595a(b) and

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[3] (being 500 PDA travel chargers and 2,311 PDA mini-keyboards, all prominently bearing petitioner Sakar's federally registered "i Concepts®" trademark brand to be sold in various national retail chain stores)

(c).[4] Customs has used its non-MSRP penalty authority during many years prior to the 1996 Congressional enactment of the § 1526(f) MSRP Penalty provision in issue here. And now Customs declines to utilize that same appropriate non-MSRP remedy in this non-MSRP case, and indeed in many other non-MSRP importer cases.

Those other non-MSRP cases include a large companion agency case now pending in Customs HQ that is also alleged against Sakar for the same PDA travel chargers non-MSRP merchandise (under a separate import shipment) that follows right behind the present case.

Customs' practice thus is to lob a high-magnitude, putative § 1526(f) "MSRP" Penalty onto all alleged counterfeit import goods cases of any type including non-MSRP goods cases, including *Sakar*. Customs thereby imposes an *ultra vires* "MSRP" penalty enforcement program against non-MSRP importers. Basic notions of fairness and justice are offended by Customs' unauthorized enforcement penalty practice, and are denied to non-MSRP importers including petitioner Sakar.

Sakar did not pay the legally defective final ultra vires fictionalized-MSRP Penalty in this case since had it done so, no legal right or remedy for refund or adjustment exists once a penalty payment

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[4] [based not on a falsified high-magnitude, fictionalized-"MSRP" under § 1526(f) as here imposed, but rather based upon the goods' (lower) Domestic Value—being the wholesale value of the subject goods. The Domestic Value of $31,568 here is reported in Customs' August 4, 2003, penalty notice to Sakar].

is made. Sakar was thus suspended precariously between and on the horns of a serious endgame dilemma, and so chose to resort to the courts for declaratory relief. A "... *presumption of reviewability [exists], especially when the affected person is confronted with the dilemma of choosing between disadvantageous compliance or risking imposition of serious penalties.*" *Ciba-Geigy v. U.S.*, 801 F.2d 430, 434 (D.C. Cir. 1986) [italics added].

Prior to the December 29, 2005 Penalty Decision's 30-day January 29, 2006 penalty payment deadline, Petitioner Sakar therefore filed and served its action for declaratory and other relief in the CIT on January 25, 2006, seeking judicial review of Customs' final *ultra vires* fictionalized-MSRP Penalty Decision in issue. The CIT rendered its decision on December 12, 2006, holding that the court has jurisdiction under 28 U.S.C. § 1581(i)(3) and (4) "embargo" law [*i.e.*, the 19 U.S.C. § 1526(e) (and incorporated-by-reference 15 U.S.C. § 1124) embargo of counterfeit trademark goods] administration and enforcement provisions. The CIT also held that the action lacked finality in its view and thereby failed to state a claim upon which relief could be granted, and dismissed Petitioner's action.

Upon timely appeal, the CAFC subsequently held on February 19, 2008, that no CIT subject matter jurisdiction exists, and also denied the presumption of judicial review. The CAFC did not reach the finality question under appeal. The panel consequently vacated and remanded the case to the

CIT with the instruction that it dismiss Petitioner Sakar's complaint for lack of jurisdiction.

On April 11, 2008, the CAFC denied Petitioner's timely requests for rehearing and for rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

1. National scope importance of federal customs jurisdiction, and multiple conflicts of the CAFC's decision below with the Court's "embargo" definition decision in *Kmart v. Cartier*, with the Court's and the DC Circuit's judicial review precedents, and with the CIT below merit a grant of certiorari here. Customs' repeated and current enforcement practice since 1996 hits non-MSRP importers including Sakar with high magnitude fictionalized-"MSRP" Penalties that are *ultra vires*.

Judicial clarification of Congressional delimitations of subject matter jurisdiction of federal courts that have nation-wide scope of review is of significant national importance.

Because the CAFC has national scope exclusive jurisdiction over all appeals from the CIT which itself has nation-wide exclusive jurisdiction over all customs and international trade cases

coming out of the 300+ customs ports[5] of entry located throughout the country, the CAFC ruling below vacating CIT jurisdiction is of importance to the entire nation and thus merits a granting of certiorari. As to the CAFC's national impact importance for certiorari, see *Cardinal Chemical Co., et al. v. Morton International, Inc.*, 508 U.S. 83, 89; 113 S. Ct. 1967, 1971; 124 L. Ed. 2d 1, 10 (1993) (nation-wide scope and origin of CAFC patent case appeals).

The § 1526(e) embargo law in issue here is separate from and clearly not contrary to or inconsistent with the terms of the Court's majority holding (J. Brennan writing) in *Kmart v. Cartier* [jurisdiction opinion], 485 U.S. 176, 108 S. Ct. 950, 99 L. Ed. 2d 151 (1988).

Kmart was adjudicated as to the non-"embargo" dual conditions-precedent of the limited, pre-conditioned 19 U.S.C. § 1526(a) regulatory import prohibition there in issue in the Court's 5-to-3 decision. Justice Scalia posted a vigorous dissenting opinion joined by C.J. Renquist and J. O'Connor.

The Customs HQ agency renders formal decisions with extensive written opinions containing findings of fact and conclusions of law in contested large-case penalty claims over $100,000 in original amount, coming from the ports located throughout the country. In this type of larger contested HQ

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[5] See *www.cbp.gov/AboutCBP/Organization/LocateAPort*, as to the 327 official U.S. ports of entry governed by Customs throughout the country.

penalty case Customs has, by a measure of "lawyerly invention" that was decried by both Justices Brennan and Scalia (from differing positions) in *Kmart, ibid.* 485 U.S. at 187 and 195, sought here to oust the national-scope federal courts, the CIT and CAFC, from subject matter jurisdiction for judicial review of national-scope agency action.

The CAFC has now bought into that ouster of the national courts by its rejection of the CIT's exercise of jurisdiction below. This jurisdiction ouster is in conflict with the Court's "embargo" law definition in *Kmart*.[6] That definition centers on the

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[6] *Ibid.*, at 185-86, providing as follows: "As the above-quoted definitions [of 'embargo'] suggest, the ordinary meaning of 'embargo' and the meaning that Congress apparently adopted in the statutory language 'embargoes or other quantitative restrictions,' is a governmentally imposed quantitative restriction—of zero—on the importation of merchandise.

"As importation prohibition is not an embargo if rather than reflecting a *governmental* restriction on the quantity of a particular product that will enter, it merely provides a mechanism by which a private party might, at its own option, enlist the Government's aid in restricting the quantity of imports in order to enforce a private right.

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"The private party, not the Government, by deciding whether and how to exercise its private right, determines the quantity of any particular product that can be imported.

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"It [the § 526(a) import prohibition] grants the trademark owner a bundle of such [private] rights, one of which is the right to enlist the Customs Service's aid to bar foreign-made goods bearing that trademark." [bracketed references added].

presence of individual trademark owner initiation and control over exclusion of certain imports (a non-embargo), *versus* the independent Governmental initiation and control over a complete ban of proscribed counterfeit trademark imports (a Government embargo) present in this *Sakar* case.

The CAFC, further, rejected the strong presumption of judicial review of agency action, in conflict with this Court's long standing precedents since 1803 to the present that favor judicial review over executive branch agency action.

The CAFC's rejection of CIT jurisdiction is in conflict also with the CIT's own exercise of the same below in this case.

This occurs in a situation where the agency has adopted, after Congress' 1996 enactment of § 1526(f), a practice and program of hitting non-MSRP importers with high-magnitude ultra vires fictionalized-"MSRP" Penalties in non-MSRP goods cases including this case. And it occurs in the situation where Congress has said a penalty fine "according to the manufacturer's suggested retail price" ("determined under regulations promulgated by the Secretary") in its § 1526(f) MSRP instructions to Customs. Congress did not say 'estimated,' 'projected,' 'constructed,' or 'fictionalized' MSRP in § 1526(f); it said "the manufacturer's" suggested retail price.

None of Customs' contested larger-case HQ Penalty Decisions will as a consequence receive the possibility of appropriate judicial review if

jurisdiction is now denied to the CIT and to CAFC appellate review. The Court's supervisory attention to this national-scope jurisdiction case is consequently an important matter for certiorari purposes.

A grant of certiorari now by the Court is appropriate, in summary, due to national customs jurisdiction importance, conflict of the CAFC decision below with the Court's *Kmart* decision, conflict with the Court's long standing judicial review precedents, and conflict with the CIT's own exercise of jurisdiction below. Customs' indiscriminate *ultra vires* imposition of the fictionalized-"MSRP" penalty remedy against non-MSRP imports and importers since 1996 moreover merits that judicial attention be given to Customs' breach of Congress' MSRP instructions that are specifically given to the agency in the § 1526(f) penalty remedy statute.

2. Independent "embargo" law jurisdiction exists here for the CIT.

Customs' exclusion by seizure of alleged counterfeit trademark import goods is statutorily compelled Government action imposed by 19 U.S.C. § 1526(e) and its incorporated 15 U.S.C. § 1124 provisions, as an embargo-ban of Congressionally proscribed imports. This is the case in the present *Sakar* action, where no statutory requirement for any pre-requisite trademark owner action(s) exists for the embargo's imposition. The scope of this Court's 1988 *Kmart* "embargo" jurisdictional holding, thereby permits exclusive subject matter jurisdiction

to the Court of International Trade under 28 U.S.C. § 1581(i)(3) and (4) in this case.

The 19 U.S.C. § 1526(*a*) statute discussed in *Kmart* is wholly preconditioned, is individual private party owner-generated, and is subjunctive in its terms—it is a dependent non-embargo import regulatory law, dependent upon pre-requisite private trademark owners' dual preliminary actions.[7] Section 1526(*e*) relevant in this *Sakar* case however, is an *un*-preconditioned Government generated, imposed, and imperative ban in its terms that compel zero imports of counterfeit trademark goods—it is an independent embargo law.[8]

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[7] § 1526(*a*) provides in pertinent part that "... it shall be unlawful to import ... [merchandise of foreign manufacture]... *if* such merchandise ... bears a trademark owned by [a domestic citizen or corporation]... registered in the Patent and Trademark Office... *and if* a copy of the certificate of registration of such trademark is filed with [Customs],... unless written consent of the owner of such trademark is produced at the time of making entry." 19 U.S.C. § 1526(a). [Italics and underscores added].

[8] § 1526(*e*) provides in pertinent part that "Any such merchandise bearing a counterfeit mark (within the meaning of section 1127 of Title 15) imported into the United States in violation of the provisions of section 1124 of Title 15, *shall be seized* and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws. Upon seizure of such merchandise, the Secretary shall notify the owner of the trademark, *and shall, after forfeiture, destroy the merchandise*. Alternatively, if the merchandise is not unsafe or a hazard to health, and the Secretary has the consent of the trademark owner, the Secretary may obliterate the trademark where feasible and dispose of the goods seized— ... [to government agencies in need for such merchandise, or to eleemosynary institutions with similar need, or to public

Kmart and its § 1526(a) non-embargo holding does not apply to the § 1526(e) embargo-ban at issue here in the *Sakar* case, contrary to the CAFC panel's holding below.

Kmart's non-embargo restriction is wholly dependent on prior specific, individual trademark owner actions. *Sakar's* full embargo-ban is by its terms *in*dependent of any trademark owner actions or inactions.

That is because the un-adjudicated § 1526(e) and incorporated § 1124 statutory provision now in issue establishes by its terms a compulsory Government ban that falls within the Court's definition of "embargo" discussed (but not found) in *Kmart*, *ibid.* at 185, and is contrary to the CAFC panel's denial of CIT "embargo" subject matter jurisdiction below. Section 1124 is quite plain in its terms: " ... *no [proscribed] article shall be admitted to entry* at any customhouse...." [Italics added].

Kmart involved the validity of Customs' regulations governing lawful admission (*permitting entry*) of trademarked genuine-goods parallel imports where district court jurisdiction was there sought and sustained for a facial challenge to the regulations. Unlike *Kmart* however, the present *Sakar* case seeks judicial review of a specific *ultra vires* Customs HQ final administrative agency enforcement action (a fictionalized-"MSRP" Penalty imposition) that falls within statutory 28 U.S.C. §

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auction if no such needy agency or institution is established]." 19 U.S.C. § 1526(e). [Italics and underscores added].

1581(i)(3) and (4) exclusive CIT jurisdiction over the § 1526(e) embargo-ban (*denying entry*) that emanates from the Tariff Act of 1930, 19 U.S.C. §§ 1202-1681b.

Sakar is not *Kmart; and, the panel's erroneous non-embargo ruling below is in conflict with Kmart's non-embargo holding-result and in conflict with Kmart's "embargo" definition there because an independent, full embargo is present here in our Sakar case.* The express statutory terms of §§ 1526(e) and 1124 establish a Government embargo initiated by, controlled by, and carried out by Governmental action. This is so regardless of whether a pertinent name, mark, or trademark has been registered and recorded by a private party owner under § 1124, or not. The un-preconditioned § 1526(e) embargo in *Sakar* is thus independent from, innately different from, and broader than the twice-precedent conditioned § 1526(a) limited import prohibition restriction that was discussed in *Kmart* and was held there not to be an "embargo" *because* it is by law pre-conditioned and trademark owner activated.

The CAFC below misconstrued, or erroneously rejected, that innate difference without saying so or dealing with the point.

An overriding legal reality of compulsory embargo prevails here. In the CAFC panel's failure to uphold the CIT's correct jurisdictional holding below that § 1526(e) and its incorporated § 1124 provisions constitute an "embargo" ban of statutorily banned "counterfeit," "copy," or "simulate[ed]"

goods,[9] the panel has we submit overlooked an overriding legal reality. That is the reality that *where* Customs' followup post-seizure inquiries as to existence of any trademark owner's consent or license occur, it means merely that any seized goods as are so discovered by Customs[10] to be consented or licensed are not counterfeit by legal definition in the first place. Those lawful, licensed, non-counterfeit goods are not in any event subject to the Government embargo of § 1526(e). Thus trademark owners, contrary to the CAFC's ruling below, do not in fact or in law "control entry" of any counterfeit trademark goods under the embargo here, or anywhere. Counterfeited goods are by law, per se, precluded from any entry—by Government control.

Contrary also to the CAFC panel's holding below, the trademark owner therefore does not retain any Kmart-styled "ultimate control" over whether or not counterfeit merchandise itself is imported under the § 1526(e) embargo now in issue. The CAFC held otherwise below. That was incorrect. For if indeed counterfeit (*not* licensed or consented), the goods cannot in any event be lawfully entered into Commerce under the express statutory terms of the

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[9] (whether *or not* a strictly optional aid of registration and recordation of a trademark is present, *or* whether or not enforced as to an *un*-registered commercial "name of a manufacture, manufacturer, or trade," in incorporated 15 U.S.C. § 1124's express terms).

[10] Customs, by its 19 C.F.R. § 133.21(*e*) regulation, goes voluntarily and administratively beyond 19 U.S.C. § 1526(e)'s expressed embargo-ban notification of "the trademark owner" terms in order that Customs may ascertain if the embargo-seized goods may be consented/licensed by a trademark owner.

§ 1526(e) embargo-ban—they "shall be" seized and destroyed.

Customs' contacts with trademark owners are administrative matters occurring after imposition of the compulsory statutory embargo seizure. Customs' communication with trademark owners in administering the §§ 1526(e) and 1124 un-preconditioned embargo is salutary in that it may help 'weed-out' Customs' agents' errors at a port. That, in however many voluntary administrative steps as Customs might itself choose to apply, does not reduce or vitiate the overriding legal fact that § 1526(e) is a full embargo-ban. The ban is altogether imposed and controlled by Government, not by any trademark-owner action(s) in a private party's registration and recordation of a trademark or otherwise, under plain statutory terms of § 1526(e). This is so even though or despite that a trademark owner "may" optionally "aid...officers...of ...Customs in enforcing...[the § 1526(e) embargo]" by causing a registered trademark to be "recorded" with Customs under language within incorporated 15 U.S.C. § 1124. A registered trademark owner thereby may, or may not as the case might be, voluntarily aid or augment Customs' office records.

But Customs itself is statutorily required by Congress in any event to initiate and to perform the embargo-ban of § 1526(e). That is Customs' job.

The Government embargo thereby stands on its own, stated-text statutory legs without any "enlistment." Under the § 1526(e) embargo here, a trademark owner factually and legally does <u>not</u>

"enlist the government's aid in restricting the quantity of imports to enforce a private right" or "to bar foreign-made goods bearing [its] trademark" as in the pre-conditions of § 1526(a) terms and their *Kmart* interpretation, *ibid.* 485 U.S. at 185-186—contrary to the panel's holding below. Such an enlistment is, to be sure, statutorily mandated under the limited pre-conditioned § 1526(a) with its dual conditions-precedent requirements of trademark owner-action registration and recordation dealt with in *Kmart.*

Under the § 1526(e) full embargo terms here in issue however, it is the Government itself (Congress) that has enlisted a Government agency (Customs) to perform an un-preconditioned embargo, without making any statutory pre-requirement(s) of private action(s) to "enlist" the Government's compulsory embargo action or indeed to do anything.

Customs thus by law *must* make seizures of proscribed import goods under the § 1526(e) Government embargo without any of the private party pre-conditions that must first trigger any operation of the dependent § 1526(a) non-embargo proviso of *Kmart.*

3. "Revenue law" jurisdiction also exists here for the CIT, upon two bases.

Exclusive subject matter jurisdiction to the Court of International Trade also exists under 28 U.S.C. § 1581(i)(1) and (4), in that the present non-monetary claim for judicial review of Customs' administration and enforcement agency action

"arises out of" of a law providing for revenue from imports, the Tariff Act of 1930.

The CAFC panel decision below ignores that court's own and other clear precedents. Those precedents support squarely the proposition that this non-monetary claim case, like a number of other decided cases that do not present a per se monetary dispute, is indeed a "...civil action commenced against the United States..." that "...*arises out of* any law ... providing for—... revenue from imports..." within jurisdictional terms of 28 U.S.C. § 1581(i)(1).

The CIT, with CAFC approvals, has exercised jurisdiction under § 1581(i)(1) and (4) in a variety of administration and enforcement cases over non-monetary regulatory disputes or claims that arise out of the Tariff Act, being a law providing for revenue from imports. Those non-monetary claim cases have involved, for example, disputes over the following regulatory subjects:

- FTZB's imposed administrative duty-handling operational conditions; the CAFC granted § 1581(i)(1) and (4) jurisdiction, and pointed out that district courts take jurisdiction over APA origin cases, and that the CIT takes jurisdiction "over various trade and tariff matters contained in 28 U.S.C. § 1581." (*Conoco v. U.S.*, 18 F.3d 1581, 1586 (Fed. Cir. 1994)).

- Congress' intent "to assure comprehensive [CAFC] review" under § 1581(i)(1) and (4) of a "broad spectrum of administrative actions arising out of our international trade laws," includes revocation of a customhouse cartman's license (*U.S. v. Bar Bea Truck Leasing Co.*, 4 CIT 104, *aff'd in part rev'd in part*, 713 F.2d 1563, 1566 (Fed. Cir. 1983)),

- international courier service for entry of transported merchandise in consolidated shipments (*National Customs Brokers and Forwarders Ass'n of America v. U.S.*, 14 CIT 108, 731 F. Supp. 1076 (1990)),

- annual bonded warehouse fees for government inspection and supervision (*National Bonded Warehouse Ass'n v. U.S.*, 13 CIT 78, 706 F. Supp. 904 (1989)),

- a license to operate a container station near an international airport (*Air Cargo Services v. U.S.*, 12 CIT 50, 678 F. Supp. 296 (1988)),

- "broad jurisdiction grant" of § 1581(i)(1) and (4) over international trade includes administrative revocation of a customhouse cartman's license (*Di Jub Leasing Corp. v. U.S.*, 1 CIT 42, 44; 505 F. Supp. 1113, 1115 (1980)).

In the leading 1994 *Conoco* case first noted above, the Federal Circuit ruled that the CIT has jurisdiction under 28 U.S.C. § 1581(i)(1) and (4) in

an appeal from a CIT dismissal of a contest of the Foreign Trade Zone Board's ["FTZB"] regulatory *administrative* actions imposed on the Conoco company. *Conoco v. U.S.*, 18 F.3d 1581 (Fed. Cir. 1994). No monetary-item or claim amount was per se at issue or contested in *Conoco*—just as in our *Sakar* case that contests Customs' *ultra vires* "MSRP"-Penalty fictionalization imposed upon petitioner Sakar. Thus CIT judicial review under § 1581(i)(1) and (4) subject matter jurisdiction was granted by the CAFC in *Conoco*, and judicial review of agency action was "presumed" on appeal. This was done despite the fact that the challenged FTZB agency administrative sub-Zone *grant* action conditions in issue were not governed by the FTZ statute's[11] express grant of statutory-based judicial review (in a circuit court of appeals) only for Zone or sub-Zone administrative *revocation* actions. The CAFC thereby held that:

> It is *well established that judicial review of agency action is to be presumed*, absent clear and convincing evidence of Congressional intent to the contrary.
>
> ***
>
> The language, or absence of it, in this statute regarding judicial review cannot constitute the clear and convincing evidence required to bar such review. *See Abbott Lab.*, 387 U.S. at 141, 87 S. Ct. at 1511-12 (the mere fact that a statute provides for review of

[11] [Foreign Trade Zones Act of 1934, 19 U.S.C. § 81a-81u]

certain enumerated actions is insufficient evidence of congressional intent to foreclose review of other actions).
Conoco, *ibid.* at 1585 [italics emphasis added].

The CAFC amplified further as follows:

"If jurisdiction lies in district courts for review of these [FTZB] orders, it must lie there because of the general grant of jurisdiction in 28 U.S.C. § 1331 (1988) over causes of action created in § 10(c) of the APA, 60 Stat. 243 (1946)(codified as amended at 5 U.S.C. § 704 (1988)). *If it lies in the Court of International Trade, it is because of the exclusive grant to the [CIT] of jurisdiction over various trade and tariff matters contained in 28 U.S.C. § 1581.... [T]he [CIT has] broad jurisdiction 'over any civil action against the United States arising out of the federal statutes governing import transactions.'"* 18 Fed. 3d 1581, at 1586. [italics emphasis and brackets added].

Noting the litigious, costly, and difficult jurisdictional squabbling that transpires under the § 1581(i) CIT residual jurisdiction statute, the CAFC observed that CIT Judge Carman had "...castigated the government for playing 'jurisdictional ping-pong....'" The CAFC granted § 1581(i)(1) and (4) CIT "revenue" law subject matter jurisdiction to appellant importer Conoco's case, and accordingly held that "It is time to ... end the unproductive jurisdictional ping-pong games, and give litigants

their right to expeditious and timely decisions on the merits of their claims." *Ibid.* at 1584 and 1590. The CAFC thus seconded Judge Carman's expressed trial court exasperations that such "jurisdictional ping-pong games" require litigants:

> '...to navigate arcane jurisdictional passages. They waste time and resources fighting over jurisdiction and oftentimes they are denied a chance to be heard.... These obstacles unnecessarily increase cost and hurt the efforts of the United States to be competitive in the international economy.'

Ibid. at 1590.

Our CAFC panel in *Sakar*, in its opinion below, App. 19-20, limited its decisional scope solely to the (absence of) monetary specific-amount "revenue" aspects of the "punitive" 19 U.S.C. § 1526(f) MSRP-Penalty fictionalization here in issue. Petitioner Sakar's case and argument, including the allegations of our first amended complaint pleading in its paragraph 2, are however (like *Conoco* and the other non-monetary claim jurisdictional precedents listed above) in fact textually and alternatively "pointed" much more broadly than only to subsection 1526(f) and its MSRP-Penalty. Other portions or subsections of § 1526 are also included for jurisdictional basis purposes here as consistently alleged and argued by Sakar. This includes the textually inter-referenced [in subsection (f)'s express language] subsection 1526(e) embargo law ban provision imposed against Sakar, arising also "out of" the Tariff Act of 1930 "revenue" law itself.

The inter-related subsections (e) and (f) of § 1526 are thus companion provisions. Without an "(e)" embargo seizure, there can be no "(f)" "MSRP" penalty case in subsection (f)'s terms that state direct reference and applicability to "subsection (e)" seized merchandise. Subsections (e) and (f) are thereby two peas in a legal pod that Congress inter-referenced in its passage of the Anti-counterfeiting Consumer Protection Act of 1996 (dealing only with the two subsections) eight years after the *Kmart* decision of the Court.

Customs' administration and enforcement penalty-phase cases, including *Sakar* here, under both textually inter-related subsections (e) *and* (f) of § 1526, accordingly "arise out of" a "revenue" law for 28 U.S.C. § 1581(i)(1) and (4) subject matter jurisdiction purposes we submit. A doubled-up subject matter jurisdictional scope thereby results, and sweeps in *both* "embargo" law [Tariff Act § 526(e) based] *and* "revenue" law [Tariff Act § 526(f) based] elements just such as in our *Sakar* case, as a matter of law under the broad language of the § 1581(i)(1) and (4) "revenue" law jurisdiction provisions.

In *Conoco*, the CAFC held as noted above that CIT subject matter jurisdiction is "broad." Now, the CAFC has inexplicably held below here in *Sakar* that CIT § 1581(i)(1) and (4) jurisdiction is narrow, "limited," and "not to be expanded...." Panel opinion, at App. 21. We did not intend to seek "expanded" jurisdiction here. We instead seek previously recognized CIT "revenue" law jurisdiction like that

granted under *Conoco* and under the five (5) other non-monetary claim cases cited above. The present § 1526 *Sakar* case indisputably "arises out of" a revenue-law—the Tariff Act of 1930—, and therefore comes under the broad 28 U.S.C. § 1581(i)(1) and (4) "revenue" law residual exclusive jurisdiction of the CIT.

Many if not most all of the Tariff Act's many trade regulatory provisions are non-duty, non-tariff, non-monetary matters in nature and content. If the Congress in any way intended or wanted §1581(i)(1) CIT "revenue"-law jurisdictional scope to apply only and narrowly to specific monetary-claim disputes, then Congress could have and would have we submit, simply so limited its CIT jurisdiction statutory language in § 1581(i)(1). For an example, Congress could have said "duties, duty drawback, revenue charges, refund claims" or the like, without its use of the broad "arises out of" statutory jurisdictional language.

But Congress did not so limit § 1581(i)(1) CIT subject matter jurisdiction. And the courts have followed suit in exercising broad jurisdiction over non-monetary claims, until the present case.

4. The CAFC rejection of CIT judicial review also conflicts with the Court's and with the DC Circuit's long standing judicial review precedents.

As noted above in this petition's statement of the case, a "... presumption of reviewability [exists], especially when the affected person is confronted

with the dilemma of choosing between disadvantageous compliance or risking imposition of serious penalties." *Ciba-Geigy v. U.S.*, 801 F.2d 430, 434 (D.C. Cir. 1986). Our CAFC panel decision below, in denying the presumption of reviewability, consequently presents a conflict with the DC Circuit's reviewability holding in *Ciba-Geigy*.

Our Federal Circuit panel below distinguished its own *Conoco* decision, in wooden, blindered fashion we respectfully submit, by holding as follows:

> * * * In *Conoco*, we did not hold that the appellants were entitled to "non-statutory, judicially-granted" review. Instead, starting from the presumption that agency action is subject to judicial review, we analyzed various federal statutes in order to determine which statute provided jurisdiction over the appellants' case and, thus, where jurisdiction was proper (i.e., in the Court of International Trade or in the appropriate district court). *Conoco*, 18 F.3d at 1585-1590. *Conoco* provides no support for Sakar's concept of "non-statutory, judicially-granted" review. Sakar's final *jurisdiction argument* thus fails. [Italics and underscore emphases added].

Panel opinion below, at App. 21.

In addition to conflicting with the DC Circuit's *Ciba-Geigy* reviewability-point authority, this holding of the panel formalistically misapprehends, in error we respectfully submit, petitioner Sakar's

case and argument. We do not say and have not said that the judicial review presumption is a "jurisdiction argument" of Sakar. Rather, we submit that our claim for the application of "the [strong] presumption that agency action is subject to judicial review" would seem to be remedial (not subject matter jurisdictional) in nature. If we are mistaken and if the presumption of judicial review is indeed tantamount to a form of "jurisdiction," then we would accede to that jurisdictional basis as might be appropriate. In any case, CIT trial court § 1581(i) subject matter jurisdiction is here the primary issue we believe, and the CAFC then of course has appellate exclusive jurisdiction over all appeals from the CIT's final decided cases under 28 U.S.C. § 1295(a)(5). This includes jurisdiction here over the present *Sakar* case.

Whether or not commonly or formalistically described as "non-statutory, judicially-granted judicial review," or somehow described rhetorically otherwise, the Court's "strong presumption of judicial review" is an anchor of the legal system since the Republic's early days,[12] so long as proper subject matter jurisdiction firstly exists for a case. Just as we claim is the case here in *Sakar*, where judicial review should be presumed.

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[12] See *Bowen v. Mich. Academy of Family Physicians et al.*, 476 U.S. 667, 106 S. Ct. 2133, 90 L. Ed. 2d 623 (1986) (*holding* a "...strong presumption that Congress intends judicial review of administrative action," and citing *Marbury v. Madison*, 1 Cranch 137 (1803) and succeeding cases in support, 476 U.S. at 670, 106 S. Ct. at 2135-36).

CONCLUSION

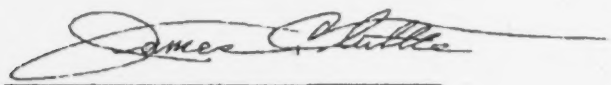
CIT subject matter "embargo" law and "revenue" law exclusive jurisdiction grounds both exist for this case. The strong presumption of judicial review of administrative agency action established by long standing precedents of the Court under the Constitution's Article III, Section 2, is moreover available, given a judicial approval of the same in this case at this time.

Grant of certiorari is warranted here for significant nation-wide jurisdictional importance, and additionally for multiple direct conflicts with important precedents of the Court and with the DC Circuit.

Otherwise, Customs' HQ agency *ultra vires* large-case "MSRP" Penalty Decision opinion findings of fact and conclusions of law will never be subjected to appropriate national-scope judicial review. And therefore importantly not subjected to the Congress' MSRP instructions given to Customs, but ignored by the agency.

Petitioner accordingly requests grant of certiorari.

Respectfully submitted:



James C. Tuttle
Counsel of Record

July 2, 2008

Tuttle Law Offices
82 Wall Street, Suite 1105
New York, NY 10005
Phone: 212-742-7965
Fax: 212-742-7965,
or fax: 609-924-0201
E-mail: tuttlelink@aol.com

[Entered February 19, 2008]

United States Court of Appeals for the Federal Circuit

2007-1173

SAKAR INTERNATIONAL, INC.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

James C. Tuttle, Tuttle Law Offices, of New York, New York, argued for plaintiff-appellant.

Domenique Kirchner, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief was Jeanne E. Davidson, Director.

Appealed from: United States Court of International Trade

Judge Timothy C. Stanceu

App. 2

United States Court of Appeals for the Federal Circuit

2007-1173

SAKAR INTERNATIONAL, INC.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of International Trade in case no. 06-00025, Judge Timothy C. Stanceu.

DECIDED: February 19, 2008

Before LOURIE, SCHALL, and GAJARSA, Circuit Judges.

SCHALL, Circuit Judge.

Sakar International, Inc. ("Sakar") brought suit against the United States ("the government") in the United States Court of International Trade to challenge an administrative decision of the Bureau of Customs and Border Protection, United States Department of Homeland Security ("Customs"), assessing Sakar a civil fine of $67,775 for the importation by Sakar of merchandise that Customs determined was counterfeit. After concluding that it

had jurisdiction over Sakar's suit pursuant to 28 U.S.C. § 1581(i)(4) as it relates to 28 U.S.C. § 1581(i)(3), the Court of International Trade ruled that Customs' assessment of the civil fine did not constitute final agency action for purposes of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704 (2000). The court therefore held that Sakar had failed to state a claim upon which relief could be granted and granted the government's motion to dismiss Sakar's complaint pursuant to USCIT Rule 12(b)(5). Sakar Int'l, Inc. v. United States, 466 F. Supp. 2d 1333, 1351 (Ct. Int'l Trade 2006).

Because we conclude that section 1581(i)(4) as it relates to section 1581(i)(3) did not provide the Court of International Trade with jurisdiction over Sakar's suit, and because we conclude that none of the other statutory provisions cited by Sakar supported jurisdiction, we vacate the decision of the Court of International Trade and remand the case to the court with the instruction that it dismiss Sakar's complaint for lack of jurisdiction.

BACKGROUND

I.

On October 7, 2002, Sakar presented for importation into the United States 500 travel chargers for personal digital assistants ("PDAs") and 2,311 mini-keyboards for PDAs, all of which were products of the People's Republic of China. Upon examination, Customs determined that the goods were "counterfeit" in that they made unauthorized use of two registered United States trademarks.

Specifically, the travel chargers bore the "UL" trademark registered to Underwriters Laboratories, whereas the mini-keyboards displayed the "Flying Window" trademark of Microsoft Corporation. Customs seized the goods on December 18, 2002, pursuant to its statutory authority under Section 526(e) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1526(e) (2000). Section 1526(e) provides in relevant part that any "merchandise bearing a counterfeit mark . . . imported into the United States . . . shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws." In a letter dated December 30, 2002, Customs notified Sakar of the seizure, and informed Sakar that the goods would be forfeited—and disposed of in accordance with 19 C.F.R. § 133.521[1]—unless, within 30 days, the trademark owners consented in writing to the importation of the goods. Consent was not received; consequently, on August 28, 2003, Customs destroyed the goods.

Subsequently, Customs exercised its discretion under 19 U.S.C. § 1526(f) to impose a civil

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[1] Section 133.52(c) requires the destruction of all forfeited merchandise unless two requirements are satisfied. First, a determination must be made that the merchandise is "not unsafe or a hazard to health." Second, the trademark owner must consent in writing to the merchandise's non-destruction. If both requirements are met, instead of destroying the merchandise, Customs may "dispose of the merchandise, after obliteration of the trademark" by either (1) delivery to any federal, state, or local government that has demonstrated a need for the merchandise; (2) gift to any charitable institution that has demonstrated a need for the merchandise; or (3) sale at public auction in certain cases. 19 C.F.R. § 133.52(c) (2007); see also 19 U.S.C. § 1526(e).

fine upon Sakar.[2] Customs set the amount of the fine at $381,500, which was twice the amount that Customs determined to be the manufacturer's suggested retail price ("MSRP") of the goods.[3] In response to a petition filed by Sakar, Customs mitigated the fine by 50% to $190,750. Eventually, in a letter dated December 29, 2005, Customs adjusted the MSRP it had initially used to calculate the fine. This recalculation resulted in a further reduction of the fine to $67,775. In the December 29th letter, Customs stated that the letter constituted the "final administrative review" available to Sakar and that Customs would accept "[n]o further petitions."

II.

Following Customs' action, Sakar filed suit in the Court of International Trade. Sakar's first amended complaint ("complaint") challenged Customs' mitigated fine by alleging, among other things, that Customs had acted contrary to law in calculating the MSRP of the seized goods and in concluding that the goods were counterfeit. Sakar,

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[2] Section 1526(f)(1) provides that "[a]ny person who directs, assists financially or otherwise, or aids and abets the importation of merchandise for sale or public distribution that is seized under [19 U.S.C. § 1526(e)] shall be subject to a civil fine." Under section 1526(f)(4), the imposition of any such fine is "within the discretion of the Customs Service."

[3] Customs determined that Sakar had been subject to two prior seizures under section 1526(e). Thus, Customs set the amount of Sakar's fine at twice the MSRP of the imported goods. See 19 U.S.C. § 1526(f)(3) ("For the second seizure and thereafter, the fine shall be not more than twice the value that the merchandise would have had if it were genuine . . . .").

466 F. Supp. 2d at 1336-37. Customs eventually moved to dismiss the complaint under USCIT Rule 12(b)(1) for lack of subject matter jurisdiction or, alternatively, under USCIT Rule 12(b)(5) for failure to state a claim on which relief could be granted. Id.

Sakar's complaint purported to base the Court of International Trade's jurisdiction on several different provisions of 28 U.S.C. § 1581. The court declined to exercise jurisdiction under all but one of those provisions, concluding that jurisdiction was proper only under section 1581(i)(4) as it relates to section 1581(i)(3). Id. at 1337-46. Section 1581(i) provides in pertinent part as follows:

> [T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> . . .
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection
>
> . . . .

The court concluded that Customs' seizure of Sakar's goods amounted to an "embargo" within the meaning of section 1581(i)(3) and that the fine issued by Customs thus related to the "administration and enforcement" of an embargo within the meaning of section 1581(i)(4). Id. at 1341-46. Based upon that conclusion, the court held that it had jurisdiction over Sakar's claim under section 1581(i)(4) as it relates to section 1581(i)(3). Id.

Next, the Court of International Trade considered whether, under USCIT Rule 12(b)(5), Sakar's first amended complaint stated a claim upon which relief could be granted. The court first explained that none of the statutory provisions actually cited by Sakar created a cause of action. Id. at 1347. Consequently, the court reasoned that, if Sakar was entitled to bring any claim at all, the claim had to be premised upon the APA's "right of review" provision, 5 U.S.C. § 702. Section 702 generally entitles any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . to judicial review thereof." Id. However, in the court's view, even if Sakar's first amended complaint had ascribed its cause of action to the APA—which it did not—Sakar would have been unable to satisfy the APA's requirement of a

"final agency action" under 5 U.S.C. § 704.[4] Sakar, 466 F. Supp. 2d at 1347. According to the court, that was because the action taken by Customs was neither the "consummation of the agency's decision-making process" nor "one by which rights or obligations have been determined, or from which legal consequences will flow." Id. at 1347-48 (quoting Bennett v. Spear, 520 U.S. 154, 177-78 (1997)).

The court explained that, although the December 29, 2005 letter stated it was the "final administrative review" available to Sakar, the letter did not actually represent the "consummation of the agency's decision-making process" because Customs retained discretion over the ultimate decision of whether or not to sue Sakar in a district court in order to collect the fine. Id. at 1348. Further, the court reasoned, the letter did not determine any legal rights or obligations because the letter expired according to its own terms when Sakar failed to pay the fine within 30 days. Id. at 1347. By the time Sakar initiated its suit in the Court of International Trade, the mitigated fine set forth in the letter no longer had any legal effect. Id. According to the court, any subsequent suit by Customs to collect the fine would be a de novo proceeding in federal district court. Id. at 1347-48. Thus, the court determined

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[4] Section 704 provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." When review is sought not pursuant to specific statutory authorization, but only under the general review provisions of the APA, the "agency action" referred to in section 702 must be "final agency action" within the meaning of section 704. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 61-62 (2004); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882 (1990).

that "the findings of fact and conclusions of law Customs made during the administrative proceeding are no longer of any binding legal effect." Id. at 1348.

Because the action taken by Customs was not "final agency action," the court held that Sakar had failed to plead a cause of action that could entitle it to relief under the APA. Id. at 1350. Moreover, the court found that Sakar had not alleged a non-statutory (i.e., constitutional) cause of action despite Sakar's purported "due process" claim. Id. Therefore, the court granted the government's motion to dismiss Sakar's first amended complaint under USCIT Rule 12(b)(5). Id. at 1351.

DISCUSSION

We have jurisdiction over Sakar's appeal pursuant to 28 U.S.C. § 1295(a)(5). On appeal, Sakar argues that the Court of International Trade erred in dismissing its complaint for failure to state a claim upon which relief could be granted. Sakar contends that the administrative fine set forth in Customs' December 29, 2005 letter was sufficiently final for judicial review by the Court of International Trade. With respect to the merits of the case, Sakar asserts that Customs acted contrary to the law in calculating the MSRP of the seized goods. The government responds that the Court of International Trade erred in ruling that it had jurisdiction over Sakar's suit. At the same time, the government argues that, assuming it had jurisdiction, the Court of International Trade did not err in dismissing Sakar's complaint under USCIT Rule 12(b)(5). For the reasons set forth below, we hold that the Court of

International Trade erred in ruling that it had jurisdiction over Sakar's suit. We therefore vacate the court's decision and remand the case to the court with the instruction that it dismiss Sakar's complaint for lack of jurisdiction.

I.

Whether the Court of International Trade had subject matter jurisdiction over Sakar's suit is a question of law that we review de novo. Int'l Custom Prods., Inc. v. United States, 467 F.3d 1324, 1326 (Fed. Cir. 2006) (citing Xerox Corp. v. United States, 289 F.3d 792, 793-94 (Fed. Cir. 2002)). As stated above, the court held that it had jurisdiction over Sakar's claim under 28 U.S.C. § 1581(i)(4) as it relates to 28 U.S.C. § 1581(i)(3) because Customs' seizure of Sakar's goods amounted to an "embargo" within the meaning of section 1581(i)(3) and, thus, the fine assessed against Sakar by Customs related to the "administration and enforcement" of an embargo within the meaning of section 1581(i)(4). Sakar, 466 F. Supp. 2d at 1346.

However, the government, relying upon K Mart Corp. v. Cartier, Inc., 485 U.S. 176 (1988), argues that the seizure of Sakar's goods did not constitute an embargo. Hence, the government urges that the Court of International Trade erred when it held that it had jurisdiction over Sakar's claim.

In K Mart, the Supreme Court considered whether 19 U.S.C. § 1526(a), which makes it unlawful to import into the United States goods bearing a registered U.S. trademark without the trademark owner's written consent, creates an

"embargo" within the meaning of 28 U.S.C. § 1581(i)(3). The Court concluded that the word "embargo" should be interpreted according to its ordinary meaning, which is "a governmentally imposed restriction—of zero—on the importation of merchandise." Id. at 185. The Court explained that "[a]n importation prohibition is not an embargo if rather than reflecting a governmental restriction on the quantity of a particular product that will enter, it merely provides a mechanism by which a private party might, at its own option, enlist the Government's aid in restricting the quantity of imports in order to enforce a private right." Id. (emphasis in original). According to the Court, section 1526(a) creates an importation prohibition of the latter type. Id. The Court reasoned that section 1526(a) is "very different from an embargo" because "[t]he trademark owner has the sole authority to decide that all products bearing its trademark will enter or that none will, and to decide what entity may import them, under what conditions, and for what purpose." Id. at 185-87.

The government argues that the Supreme Court's holding in K Mart with respect to 19 U.S.C. § 1526(a) applies with equal force to 19 U.S.C. § 1526(e), the statutory provision under which the government acted in this case. That is, the government contends that a seizure of goods under section 1526(e) does not constitute an "embargo" because it is not a governmentally imposed quantitative restriction on the importation of merchandise. Thus, a civil fine issued by Customs under section 1526(f) does not relate to the "administration and enforcement" of an embargo.

For these reasons, the government contends that the Court of International Trade did not have jurisdiction over Sakar's claim under section 1581(i)(4) as it relates to section 1581(i)(3).

In response, Sakar argues that the Court of International Trade correctly determined that it had jurisdiction. Specifically, Sakar distinguishes K Mart by urging that section 1526(e), unlike section 1526(a), constitutes a complete ban on the importation of counterfeit goods. According to Sakar, the governmentally imposed restrictions of section 1526(e) establish an "embargo" under section 1581(i)(3), and, therefore, the fine issued by Customs to Sakar relates to the "administration and enforcement" of an embargo under 28 U.S.C. § 1581(i)(4). Thus, Sakar contends that section 1581(i)(4) as it relates to section 1581(i)(3) provided the Court of International Trade with jurisdiction over Sakar's claim.

II.

Section 1581(i)(3) grants the Court of International Trade exclusive jurisdiction over cases against the United States that arise out of any law providing for "embargoes or other quantitative restrictions on the importation of merchandise . . . ." Section 1581(i)(4), in turn, grants the Court of International Trade jurisdiction over cases arising out of any law that provides for "administration and enforcement with respect to the matters referred to in" section 1581(i)(3). Thus, section 1581(i)(4) as it relates to section 1581(i)(3) provides the Court of International Trade with jurisdiction over cases that arise out of

any law providing for the administration and enforcement of an embargo.

The critical question in this case is whether 19 U.S.C. § 1526(e) establishes an "embargo." Section 1526(e) provides, in relevant part:

> Any such merchandise bearing a counterfeit mark (within the meaning of section 1127 of Title 15) imported into the United States in violation of the provisions of section 1124 of Title 15, shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws.

By its terms, section 1526(e) incorporates provisions of the Lanham Act in order to identify which imported merchandise Customs shall seize. Specifically, under 15 U.S.C. § 1124, no imported

merchandise found to "copy or simulate"[5] a registered trademark "shall be admitted to entry at any customhouse of the United States."[6]

Examining these provisions, the Court of International Trade determined that the import restrictions imposed by sections 1526(e) and 1124 together were "sufficiently dissimilar" to those imposed by section 1526(a) that the Supreme Court's K Mart decision was not controlling. Sakar, 466 F. Supp. 2d at 1343. In K Mart, the Supreme Court determined that section 1526(a) did not create an embargo because "[t]he private party, not the Government, by deciding whether and how to

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[5] A "copying or simulating" mark is "one which may so resemble a recorded mark . . . as to be likely to cause the public to associate the copying or simulating mark . . . with the recorded mark." 19 C.F.R. § 133.22(a). However, a counterfeit mark is "a spurious mark which is identical with, or substantially indistinguishable from, a registered mark." 15 U.S.C. § 1127 (2000); 19 C.F.R. § 133.21(a). Merchandise bearing a "counterfeit mark" is thus a subset of merchandise that merely "copies or simulates" a registered mark. See Montres Rolex, S.A. v. Snyder, 718 F.2d 524, 527-28 (2d Cir. 1983) ("Thus the customs laws and regulations create a two-tier classification scheme. The first category consists of marks which are merely infringements, judged by whether they are likely to cause the public to associate the copying mark with the recorded mark. In the second category are those marks which not only infringe but in addition are such close copies that they amount to counterfeits."); United States v. 10,510 Packaged Computer Towers, More or Less, 152 F. Supp. 2d 1189, 1200 (N.D. Cal. 2001); Ross Cosmetics Distrib. Ctrs., Inc. v. United States, 18 C.I.T. 979, 984-85 (1994). Therefore, the provisions of sections 1526(e) and 1124, read together, relate only to marks that are "counterfeit."

[6] Limited, non-relevant exceptions are provided in 19 U.S.C. § 1526(d).

exercise its private right, determines the quantity of any particular product that can be imported." 485 U.S. at 185. Because section 1526(a) does not create a governmentally imposed import restriction, it does not fall within the plain meaning of "embargo." Id. Here, the Court of International Trade concluded that section 1526(e) differs from section 1526(a) in that it establishes a governmentally imposed prohibition on the importation of counterfeit merchandise. Sakar, 466 F. Supp. 2d at 1343. Central to that conclusion was the court's belief that the trademark owner, as a private party, does not control whether or not counterfeit merchandise is seized by Customs under section 1526(e). The court reasoned that section 1526(e) "does not permit the owner of a trademark to import counterfeits of its trademarked merchandise. Nor does it permit goods bearing a counterfeit trademark to be released into commerce, even with the consent of the owner of the genuine trademark." Id. In short, the Court of International Trade determined that section 1526(e) is a "governmentally imposed quantitative restriction—of zero—on the importation of merchandise." In the court's view, under section 1526(e), the government alone, not the private party, determines the quantity of any particular product that can be imported. Accordingly, the court held that section 1526(e) falls within the plain meaning of "embargo" as set forth in K Mart.

We do not agree with the Court of International Trade's interpretation of section 1526(e). Section 1526(e) does not constitute a governmentally imposed quantitative limit on importation, because under that provision the

trademark owner, not the government, retains ultimate control over whether or not the "counterfeit" merchandise is imported. In that regard, section 1526(e), like section 1526(a), "merely provides a mechanism by which a private party might, at its own option, enlist the Government's aid in restricting the quantity of imports in order to enforce a private right," K Mart, 485 U.S. at 185, and, thus, does not create an "embargo" within the meaning of section 1581(i)(3).

Section 1526(e) sets forth a two step process. First, any counterfeit merchandise imported in violation of 15 U.S.C. § 1124 "shall be seized" by Customs. 19 U.S.C. § 1526(e). Only in the absence of written consent from the trademark owner, however, is the merchandise ultimately forfeited. Id. Customs regulations set forth the specific procedures to be followed once goods are seized. Upon seizure of counterfeit merchandise, Customs must promptly notify the trademark owner. 19 C.F.R. § 133.21(c). The seized merchandise is subsequently forfeited "[u]nless the trademark owner, within 30 days of notification, provides written consent to importation of the articles, exportation, entry after obliteration of the trademark, or other appropriate disposition . . . ." Id. § 133.21(e). Importantly, under this regime, it is the trademark owner that ultimately controls the disposition of the merchandise. At any time within 30 days of notification, the trademark owner may consent to the importation of the seized merchandise. We therefore think that the Court of International Trade erred in concluding that section 1526(c) "[does not] permit goods bearing a counterfeit . trademark to be released into

commerce, even with the consent of the owner of the genuine trademark." Sakar, 466 F. Supp. 2d at 1343. To the contrary, the import prohibition created by section 1526(e) falls squarely within the holding of K Mart. Under section 1526(e), "[t]he private party, not the Government, by deciding whether and how to exercise its private right, determines the quantity of any particular product that can be imported." K Mart, 485 U.S. at 185. Thus, section 1526(e) does not impose an "embargo" within the meaning of that term as used by Congress in section 1581(i)(3) and interpreted by the Supreme Court in K Mart.

The Court of International Trade, in finding that trademark owners lack the ability to consent to the importation of "counterfeit" merchandise, apparently focused on the mandatory language of sections 1526(e) and 1124. Sakar, 466 F. Supp. 2d at 1343. Specifically, section 1526(e) provides that counterfeit merchandise imported in violation of section 1124 "shall be seized." At the same time, section 1124 states that no article of imported merchandise that copies or simulates a registered trademark "shall be admitted to entry at any customhouse of the United States." Even assuming, however, that the statutory regime does not allow trademark owners to prevent the initial seizure of

such merchandise,[7] the fact remains that the seizure of imported merchandise under section 1526(a) cannot, by itself, constitute an "embargo." That is, by simply seizing certain goods, Customs does not impose a "quantitative restriction . . . on the importation of merchandise." K Mart, 485 U.S. at 185. As explained above, seized goods may subsequently be released for importation if the trademark owner consents within 30 days of notification. A seizure of merchandise by Customs under section 1526(e) is merely an intermediate step in the ultimate disposition of that merchandise. Therefore, to the extent that a seizure under section 1526(e) may be viewed as being solely within the government's control, the seizure alone cannot constitute an "embargo." In sum, the Court of International Trade erred in holding that it had jurisdiction over Sakar's suit pursuant to 28 U.S.C. § 1581(i)(4) as it relates to 28 U.S.C. § 1581(i)(3).

III.

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[7] Both the text and context of section 1526(e) suggest that the trademark owner does, in fact, have control over whether Customs seizes the merchandise. Section 1526(e) states that "[a]ny such merchandise" bearing a counterfeit trademark shall be seized. The use of "such" apparently refers back to the introduction of the term "merchandise" in section 1526(a), which makes it unlawful to import "any merchandise" bearing a registered trademark where (1) the trademark owner files a copy of the certificate of registration with the Secretary of the Treasury and (2) the trademark owner does not consent in writing to the importation. Thus, trademark owners play a significant role in determining whether Customs may seize merchandise under section 1526(e). If, for example, the trademark owner files written consent to an importation of goods bearing its trademark, that importation would not be "unlawful"

Sakar also argues that the Court of International Trade erred in rejecting one of its alternate grounds for jurisdiction. Sakar argued that jurisdiction in the Court of International Trade was proper under 28 U.S.C. § 1581(i)(4) as it relates to 28 U.S.C. § 1581(i)(1) because the fine issued by Customs arose out of a law providing for "administration and enforcement" with respect to "revenue from imports."[8] In making this argument, Sakar pointed to 19 U.S.C. § 1526(f), the civil penalty provision, as a law providing for "administration and enforcement" with respect to "revenue from imports." The Court of International Trade rejected this argument on the ground that "[s]ection [1]526(f), which imposes civil fines associated with seizures of imported counterfeit merchandise, is not, in any ordinary sense, a law providing for revenue from imports." Sakar, 466 F.

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under section 1526(a), and, thus, Customs would not be authorized to seize the goods under section 1526(e).

[8] Section 1581(i) provides, in relevant part:

> [T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> . . .
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection . . . .

Supp. 2d at 1341. We too reject Sakar's argument. We agree with the Court of International Trade that section 1526(f) is not "in any ordinary sense" a law providing for revenue from imports. Nor does it relate to "administration and enforcement" of a law providing for revenue from imports. Section 1526(f) is punitive in nature; it authorizes Customs to issue "[c]ivil penalties" to those who import, or assist the importation of, counterfeit merchandise. Legislative history indicates that the Congressional purpose behind section 1526(f) was to strengthen the private rights of trademark owners, not to provide the government with an additional source of revenue. See S. Rep. No 104-177, at 2 (1995) ("[T]he bill strengthens the hand of businesses harmed by counterfeiters by updating existing statutes and providing stronger civil penalties against counterfeiters . . . ."); H.R. Rep. No 104-556, at 1-2 (1995) ("The purpose of H.R. 2511 is to prevent counterfeiting of copyrighted and trademarked goods and services and to ensure that counterfeit goods produced elsewhere cannot enter the United States."), as reprinted in 1996 U.S.C.C.A.N. 1074, 1074-75. Thus, the Court of International Trade correctly concluded that it lacked jurisdiction over Sakar's claim under 28 U.S.C. § 1581(i)(4) as it relates to 28 U.S.C. 1581(i)(1).

IV.

Finally, citing Conoco Inc. v. United States, 18 F.3d 1581 (Fed. Cir. 1994), Sakar argues that jurisdiction in the Court of International Trade was proper based upon what it refers to as "non-statutory, judicially-granted" review. We do not

agree. The Court of International Trade, like all federal courts, is a court of limited jurisdiction. Norsk Hydro Can., Inc. v. United States, 472 F.3d 1347, 1355 (Fed. Cir. 2006). It possesses only that power authorized by the Constitution and federal statutes, which is not to be expanded by judicial decree. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). In Conoco, we did not hold that the appellants were entitled to "non-statutory, judicially-granted" review. Instead, starting from the presumption that agency action is subject to judicial review, we analyzed various federal statutes in order to determine which statute provided jurisdiction over the appellants' case and, thus, where jurisdiction was proper (i.e., in the Court of International Trade or in the appropriate district court). Conoco, 18 F.3d at 1585-1590. Conoco provides no support for Sakar's concept of "non-statutory, judicially-granted" review. Sakar's final jurisdictional argument thus fails.

CONCLUSION

For the foregoing reasons, we conclude that the Court of International Trade lacked jurisdiction over Sakar's suit. Thus, we vacate the decision of the Court of International Trade and remand the case to the court with the instruction that it dismiss Sakar's complaint for lack of jurisdiction. Because we conclude that the Court of International Trade did not have jurisdiction over Sakar's suit, we do not address the decision by the court to dismiss Sakar's claim under USCIT Rule 12(b)(5) for failure to state a claim upon which relief could be granted.

VACATED and REMANDED

COSTS

No costs.

United States Court of Appeals for The Federal Circuit

2007-1173

SAKAR INTERNATIONAL, INC.,
Plaintiff-Appellant,

v.

United States
Defendant-Appellee

JUDGMENT

ON APPEAL from the United States Court of International Trade

in CASE NO(S). 06-00025

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: **VACATED** and **REMANDED**

ENTERED BY ORDER OF THE COURT

DATED February 19, 2008

/s/
Jan Horbaly, Clerk

[Entered December 12, 2006]

Slip Op. 06-181

UNITED STATES COURT
OF INTERNATIONAL TRADE

SAKAR INTERNATIONAL, INC.,
Plaintiff,

v.

UNITED STATES,
Defendant

Before: Timothy C. Stanceu, Judge

Court No. 06-00025

OPINION

[Granting defendant's motion to dismiss for failure to state a claim on which relief can be granted and denying for futility plaintiff's subsequent motion to amend its first amended complaint]

Dated: December 12, 2006

Tuttle Law Offices (*James C. Tuttle*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of

Justice (*Domenique Kirchner*); *Brian Morris*, Senior Attorney, Office of the Associate Chief Counsel, Bureau of Customs and Border Protection, United States Department of Homeland Security, of counsel, for defendant.

Stanceu, Judge: Plaintiff Sakar International, Inc. ("Sakar") challenges as unlawful an administrative decision issued on December 29, 2005 by the Bureau of Customs and Border Protection, United States Department of Homeland Security ("Customs"), assessing Sakar a mitigated penalty of $67,775 for the importation by Sakar of merchandise that Customs alleged to be counterfeit. Following a motion by defendant United States to dismiss for lack of subject matter jurisdiction and the failure to state a claim on which relief can be granted, plaintiff moved to amend its complaint, which it previously had amended once as a matter of course, to set forth additional grounds in support of its assertion of subject matter jurisdiction. The court grants defendant's motion to dismiss the first amended complaint for failure to state a claim on which relief can be granted and denies as futile plaintiff's motion to amend that complaint.

I. BACKGROUND

In an administrative decision dated December 29, 2005, Customs assessed Sakar a mitigated civil penalty of $67,775 "under the provisions of 19 U.S.C. § 1526(f)" and provided Sakar 30 days in which to pay the mitigated penalty. First Am. Compl. Ex. 1 at 1. According to plaintiff's pleading, Sakar did not pay the mitigated penalty and the United States has

not instituted, in any court, a proceeding to recover on the penalty claim.

The facts surrounding the issuance of the December 29, 2005 decision are summarized herein based on plaintiff's pleading and the exhibits to plaintiff's submissions. On October 7, 2002, at the port of Newark, New Jersey, Sakar entered for consumption 500 travel chargers for personal digital assistants ("PDAs") and 2,311 mini-keyboards for PDAs, all of which were products of the People's Republic of China. *Id.* ¶ 16 & Ex. 1 at 2. Customs seized this merchandise on December 18, 2002 for alleged violations of subsection (e) of Section 526 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1526(e) (2000) ("Section 526"). *Id.* ¶ 18. Section 526(e) directs the seizure of merchandise bearing a counterfeit mark that is imported into the United States in violation of provisions of the Lanham Act. *See* 15 U.S.C. § 1124 (2000). With limited exceptions, merchandise so seized must be forfeited and destroyed. *See* 19 U.S.C. § 1526(e). Customs concluded that the travel chargers violated Section 526(e) because they bore a counterfeit mark of Underwriters Laboratories and that the keyboards displayed, on a function key, a counterfeit "Flying Window" trademark of the Microsoft Corporation. First Am. Compl. Ex. 2 at 1.

Plaintiff petitioned Customs for relief from forfeiture. Customs denied Sakar any relief in the administrative forfeiture proceeding. *Id.* ¶ 19; *see* Def.'s Opp'n to Pl.'s Mot. for Stay of Execution of Penalty Enforcement or Collection and Def.'s Mot. to Dismiss Pl.'s Compl. 3 ("Def.'s First Mot. to

Dismiss"). After that denial, plaintiff did not exercise its right, as provided in the Customs regulations, to demand that Customs initiate a judicial forfeiture proceeding. *See generally*, 19 C.F.R. Part 162, Subpart E–Treatment of Seized Merchandise (2002). As a result, Customs destroyed the imported merchandise on August 28, 2003. Def.'s First Mot. To Dismiss 3 & App. 8-9.

Customs then conducted an administrative civil penalty proceeding under Section 526(f), which subjects any person importing merchandise seized under Section 526(e) to a "civil fine." *See id.*; 19 U.S.C. § 1526(f). The fine for "the first such seizure" is "not more than the value that the merchandise would have had if it were genuine, according to the manufacturer's suggested retail price, determined under regulations promulgated by the Secretary [of the Treasury]." 19 U.S.C. § 1526(f)(2). The fine "[f]or the second seizure and thereafter" is "not more than twice the value that the merchandise would have had if it were genuine, as determined under regulations promulgated by the Secretary [of the Treasury]." *Id.* § 1526(f)(3). Customs based the calculation of the fine on a finding that Sakar incurred penalties for two prior violations of 19 U.S.C. § 1526. *See* First Am. Compl. Ex. 1 at 2-3 (determining, in an internal Customs memorandum dated December 14, 2005, a mitigated penalty amount of $67,775 in response to Sakar's October 20, 2005 petition for mitigation); Def.'s First Mot. to Dismiss 3-4. In the administrative penalty proceeding, Customs originally determined the penalty amount to be $381,500 and later mitigated

the penalty to half that amount, or $190,750. *See* First Am. Compl. Ex. 1 at 1.

Plaintiff's first amended complaint alleges that the penalty notice and underlying penalty determination by Customs are contrary to law in several respects.[9] Plaintiff contends that, contrary to the plain language of 19 U.S.C. § 1526(f)(2) and (3), no regulations were promulgated under which Customs may determine a manufacturer's suggested retail price. *Id.* ¶¶ 29, 44. Plaintiff alleges that Customs did not properly determine a "manufacturer's suggested retail price" for "genuine" merchandise because no such merchandise, and no such price, exist. *Id.* ¶¶ 30, 43. With respect to the travel chargers, plaintiff maintains that the Underwriters Laboratories mark was prematurely applied by the vendor of the travel chargers but that Underwriters Laboratories belatedly acknowledged its approval of the chargers within a few weeks of the arrival of the goods in the United States. *Id.* ¶¶ 35, 36. The keyboards, according to plaintiff, were not counterfeit because the display of the Microsoft Flying Window symbol on a function key was a fair use of that symbol and a technical use reference for the convenience of the keyboard user. *Id.* ¶¶ 38, 39. Further, the method Customs used to determine that

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[9] Plaintiff amended its original complaint as a matter of course following the court's denial of plaintiff's motion to stay any agency action to enforce the civil penalty claim pending finality of the judicial review. The court denied this motion due to plaintiff's failure to satisfy the requirements for preliminary injunctive relief, including, in particular, the requirements pertaining to likelihood of success on the merits and irreparable harm. *Sakar Int'l, Inc. v. United States*, 30 CIT __, Slip Op. 06-24 (Feb. 22, 2006).

both classes of merchandise were counterfeit was, in plaintiff's view, contrary to "empirical marketplace and method proof requirements, fair use notions, and related requisites for counterfeit goods legal determinations" as set forth in prior decisions of the Court of International Trade. *Id.* ¶ 42. Based on these allegations, plaintiff's first amended complaint seeks a judgment vacating the Customs penalty decision or, alternatively, a declaratory judgment holding that the Customs civil penalty determination is invalid as contrary to 19 U.S.C. § 1526(f)(3), is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and violates the Due Process Clause of the Fifth Amendment of the Constitution of the United States. *Id.* at 19.

Defendant moves to dismiss the first amended complaint under USCIT R. 12(b)(1) for lack of subject matter jurisdiction, or alternatively under USCIT R. 12(b)(5) for failure to state a claim on which relief can be granted. Def.'s Mot. to Dismiss Pl.'s Am. Compl. and Def.'s Reply to Pl.'s Opp'n to Def.'s Mot. to Dismiss Pl.'s Compl. 3 ("Def.'s Second Mot. to Dismiss"). Defendant argues that 28 U.S.C. § 1581 (2000) does not grant the Court of International Trade jurisdiction over this action, that the issue is not ripe for judicial decision because the United States has not brought an action in any court to recover the civil penalty, and that the issuance of a civil penalty notice, absent an action to recover the penalty, does not constitute an injury in fact conferring on the plaintiff standing to sue. *Id.* at 11-12, 29-30, 36-38.

II. DISCUSSION

This case presents two issues pertaining to subject matter jurisdiction. The first issue is whether plaintiff's first amended complaint, by itself or when considered with the proposed amendment, pleads facts sufficient to bring the case within 28 U.S.C. § 1581(a), under which the court has exclusive jurisdiction over cases contesting denials of administrative protests of decisions by Customs. The second issue is whether plaintiff's case falls within 28 U.S.C. § 1581(i), which grants the Court of International Trade exclusive jurisdiction to hear cases against the United States arising under various laws of the United States that § 1581(i) describes by subject matter.

Plaintiff has the burden of pleading facts from which the court could conclude that it has jurisdiction over the subject matter of this action. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (plaintiff "must allege in his pleading the facts essential to show jurisdiction"). For the reasons stated below, the court concludes that jurisdiction is lacking under 28 U.S.C. § 1581(a) but that the court may exercise jurisdiction over the subject matter of plaintiff's case pursuant to 28 U.S.C. § 1581(i).

A. Jurisdiction Is Lacking under 28 U.S.C. §1581(a)

The first amended complaint, even when read as modified by the proposed amendment, reveals that plaintiff's case does not satisfy the jurisdictional prerequisites of 28 U.S.C. § 1581(a). Under 28 U.S.C.

§ 1581(a), the Court of International Trade has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515]." Section 1515 provides for administrative review of protests filed pursuant to 19 U.S.C. § 1514. 19 U.S.C. § 1515 (2000). Once a party has filed with Customs a protest that satisfies the requirements of 19 U.S.C. § 1514, and Customs has acted on that protest, the party may contest a denial of the protest, in whole or in part, by timely filing a summons in the Court of International Trade. *See id.* §§ 1514(a), (c), 1515 (2000); 28 U.S.C. § 2636(a) (2000) (imposing a 180-day time limit on the commencement of a judicial action contesting the denial of a protest). The facts plaintiff has pleaded in its first amended complaint, and proposed to plead in its amendment, do not establish the filing of a valid protest, a protest denial, and a timely contest of a protest denial, so as to satisfy the requirements of 19 U.S.C. § 1514 and 28 U.S.C. § 2636(a).

Plaintiff alleges that it protested the exclusion of its merchandise from entry, a decision by Customs that specifically is made protestable by 19 U.S.C. § 1514(a)(4). However, plaintiff does not challenge in this litigation the exclusion of the merchandise from entry but instead challenges its liability for a civil fine stemming from the administrative proceeding in which Customs seized and forfeited, and subsequently destroyed, the merchandise. Even were the court to construe plaintiff's claim as challenging the exclusion of the merchandise, the court would conclude that plaintiff has failed to plead facts establishing jurisdiction under 28 U.S.C. § 1581(a). Plaintiff has failed to allege facts demonstrating

compliance with the procedural requirements applicable to protests.

Plaintiff asserts jurisdiction under § 1581(a) on the basis of 19 U.S.C. § 1499, under which the failure by Customs to make a final determination on the admissibility of detained merchandise within thirty days of the presentation of that merchandise for examination is treated as a decision by Customs to exclude the merchandise for purposes of the filing of a protest. 19 U.S.C. § 1499(c)(5)(A) (2000). A party may file a protest to challenge the deemed exclusion after the close of the thirtieth day. *Id.* If Customs does not act on such a protest within thirty days of the filing date of that protest, the protest is deemed denied on the thirtieth day. *Id.* § 1499(c)(5)(B).

In its proposed amendment to the first amended complaint, plaintiff implies that it validly contested, under 19 U.S.C. § 1514(a)(4), the denial of its protests of the exclusion of its merchandise. Pl.'s Mot. for Leave to File Amendments to First Am. Compl. 1-2 ("contesting defendant's denial of plaintiff's petition protests as to 'the exclusion of merchandise from entryor delivery . . . under any provision of the customs laws . . .' under 19 U.S.C. § 1514(a)(4).") ("Pl.'s Mot. to Amend First Am. Compl."). In the proposed amendment, Sakar asserts jurisdiction "by virtue of the underlying 19 U.S.C. § 1514(a)(4) protest of CBP's deemed exclusion of Plaintiff's goods within terms of § 1514(a)(4), and § 1515(c) Review of Protests, said deemed exclusion having occurred, on information and belief, on or about November 8, 2002 (thirty (30) days following the presentation of the goods for customs

examination on or about October 7-or-8, 2002) . . . ." *Id.* at 2-3. In its response to defendant's motion to dismiss, plaintiff characterizes its March 3, 2003 petition as constituting a valid protest that was "denied" by a decision of Customs dated March 18, 2003. *See* Pl.'s Resp. in Opp'n to Def.'s Mot. to Dismiss 21 & Ex. 1 at 3-8 ("Pl.'s Resp. to Def.'s First Mot. to Dismiss").

In the March 3, 2003 petition, plaintiff contests the administrative seizure and forfeiture of its merchandise. *See id.* Ex. 1 at 4-9. A petition contesting a seizure and forfeiture, however, usually does not qualify as an administrative protest of a decision by Customs to exclude merchandise for purposes of 19 U.S.C. § 1514. *See CDCOM (U.S.A.) Int'l, Inc. v. United States*, 21 CIT 435, 438-39, 963 F. Supp. 1214, 1218-19 (1997) (citing *Int'l Maven, Inc. v. McCauley*, 12 CIT 55, 57, 678 F. Supp. 300, 302 (1988) and *R.J.F. Fabrics, Inc. v. United States*, 10 CIT 735, 738, 651 F. Supp. 1431, 1433 (1986)); *see also* 19 U.S.C. § 1514(c)(1)(D) (requiring that a protest include "any other matter required by the Secretary by regulation"); *compare* 19 C.F.R. Part 171 (2002) (concerning Customs regulatory procedures for filing petitions for remission or mitigation of fines, penalties, and forfeitures) *with* 19 C.F.R. Part 174 (2002) (concerning Congress amended 19 U.S.C. § 1514(c)(3) to lengthen the protest period to 180 days. Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108-429, § 2103(2)(B), 118 Stat. 2434, 2597-98 (2004). The amendment to § 1514(c)(3) applies to merchandise entered on or after December 18, 2004. *Id.* § 2108. Customs regulatory procedures for

protests) *and* 19 C.F.R. § 174.13 (concerning the contents of a protest). Nothing in the March 3, 2003 petition indicates that this submission was intended as a protest under 19 U.S.C. § 1514 or was intended to satisfy the requirements for protests established by the Customs regulations. *See* Pl.'s Resp. to Def.'s First Mot. to Dismiss Ex. 1 at 3-8. Moreover, after plaintiff declined to exercise its right to contest the forfeiture judicially, exclusion from entry arguably became moot upon the final administrative forfeiture and destruction of the merchandise.

Even if the court were to brush aside these difficulties and assume that the March 3, 2003 petition for relief could constitute a protest, the petition, because of untimeliness, could not constitute a timely protest on the facts that plaintiff has pleaded. Plaintiff alleges a date "on or about November 8, 2002" as the date of the deemed exclusion, based on an examination date of October 7 or 8, 2002. Pl.'s Resp. in Opp'n to Def.'s Mot. to Dismiss Pl.'s First Am. Compl. 20 ("Pl.'s Resp. to Def.'s Second Mot. to Dismiss"). To be timely under 19 U.S.C. § 1514(c) as in effect at that time, any protest against the deemed exclusion would have had to have been filed no later than ninety days after the date of the decision being challenged. 19 U.S.C. § 1514(c)(3)(B).[10] If the November 8, 2002 date of deemed exclusion is correct, plaintiff would

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[10] Congress amended 19 U.S.C. § 1514(c)(3) to lengthen the protest period to 180 days. Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108-429, § 2103(2)(B), 118 Stat. 2434, 2597-98 (2004). The amendment to § 1514(c)(3) applies to merchandise entered on or after December 18, 2004. *Id.* § 2108.

have had to file a valid protest challenging the deemed exclusion by February 6, 2003, nearly a month before the filing of plaintiff's first petition.[11] Moreover, although the Customs protest "denial" is alleged to have occurred on March 18, 2003, the summons in this case was filed on January 25, 2006, long after the 180-day period for the filing of a summons expired. *See* 28 U.S.C. § 2636(a). For these several reasons, the court concludes that plaintiff has failed to plead facts sufficient for the exercise of jurisdiction under 28 U.S.C. § 1581(a) based on 19 U.S.C. § 1499.

B. Jurisdiction Is Lacking under 28 U.S.C. § 1581(i)(4) as it Relates to § 1581(a)

Plaintiff invokes jurisdiction under § 1581(i)(4) as it relates to protest denials under § 1581(a). First Am. Compl. ¶ 4. Under § 1581(i)(4), the Court of International Trade is granted exclusive jurisdiction of any civil action against the United States that arises out of any law of the United States providing for administration and enforcement with respect to the matters referred to in the various other subsections of § 1581, including subsection (a). In support of its argument for jurisdiction under

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[11] The amended complaint and attachments indicate that the other petitions cited by plaintiff as protests were filed after the March 3, 2003 petition. Plaintiff filed a petition dated October 15, 2003 in response to the penalty notice issued by Customs in which Customs sought a penalty of $381,500. First Am. Compl. Ex. 1 at 2. Plaintiff filed a supplemental petition dated October 14, 2005 in response to the decision of Customs in which Customs mitigated the penalty by 50 percent to $190,750. *Id.* Ex. 3. Customs issued the final decision in response to the supplemental petition. *Id.* Ex. 1 at 1.

these provisions, plaintiff relies principally on *Vivitar Corp. v. United States*, 761 F.2d 1552 (Fed. Cir. 1985), a case overturned on jurisdictional grounds by the Supreme Court in *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 182 (1988).

In *Vivitar*, the Court of Appeals for the Federal Circuit ("Court of Appeals") held that the Court of International Trade properly had exercised jurisdiction under subsections (i)(3) and (i)(4) of 28 U.S.C. § 1581 to hear a challenge to the regulations promulgated by the Department of the Treasury interpreting Section 526(a). 761 F.2d at 1560. Section 526(a) provides that merchandise of foreign manufacture bearing a registered and recorded trademark owned by a U.S. citizen, corporation, or association is prohibited generally from importation absent the written consent of the trademark owner. *See* 19 U.S.C. § 1526(a). The Court of Appeals concluded that the general import prohibition of Section 526(a) constituted an "embargo" within the meaning of 28 U.S.C. § 1581(i)(3). *Vivitar*, 761 F.2d at 1560. The Court of Appeals further held in *Vivitar* that the Court of International Trade had exclusive jurisdiction pursuant to 28 U.S.C. § 1581(i)(4), as a corollary to protest jurisdiction under § 1581(a). *Id.*

The Supreme Court overturned the jurisdictional holding of *Vivitar* in *K Mart Corp.*, reasoning that the Court of International Trade did not have jurisdiction under 28 U.S.C. § 1581(i)(3) because Section 526(a) did not create an "embargo" within the meaning of the statute. *See K Mart Corp.*,

485 U.S. at 183-84.[12] Further, the Supreme Court rejected the "corollary to protest jurisdiction" reasoning, under which the Court of Appeals in *Vivitar* found jurisdiction to exist under 28 U.S.C. § 1581(a) when read together with § 1581(i)(4), because no actual protest was involved in the case. *Id.* at 190-91. Because plaintiff has not pleaded facts under which the court may conclude that this case involves a valid protest, the court rejects plaintiff's contention that the court may exercise jurisdiction under 28 U.S.C. § 1581(i)(4) as it relates to § 1581(a).

C. Jurisdiction Is Lacking under 28 U.S.C. § 1581(i)(4) as it Relates to § 1581(i)(1)

In its proposed amendment to the first amended complaint, plaintiff seeks to add text asserting jurisdiction under 28 U.S.C. § 1581(i)(1) and (i)(4). Under § 1581(i)(1), the Court of International Trade is granted exclusive jurisdiction of any civil action commenced against the United States that arises out of any law of the United States providing for "revenue for imports or tonnage." Plaintiff argues that subsection (i)(1), when construed in conjunction with subsection (i)(4), confers jurisdiction upon the court. According to plaintiff, this case arises out of a law providing for

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[12] The Supreme Court granted certiorari in *K Mart Corp.* to resolve a jurisdictional conflict among the Circuits arising from challenges to the implementation of the Treasury regulations interpreting Section 526(a). In *Coalition to Preserve the Integrity of Am. Trademarks v. United States*, 790 F.2d 903 (D.C. Cir. 1986) and *Olympus Corp. v. United States*, 792 F.2d 315 (2d Cir. 1986), jurisdiction to challenge the Treasury regulations was held to lie in the district courts and not in the Court of International Trade.

"administration and enforcement with respect to matters in" § 1581(i)(1). Pl.'s Mot. to Amend First Am. Compl. 1. Plaintiff points to the Tariff Act of 1930, of which Section 526(f) is a part, as a law providing for revenue for imports. Pl.'s Resp. to Def.'s Second Mot. to Dismiss 14. On the facts pleaded, the court must consider this case to arise out of Section 526. As an alternative, plaintiff characterizes Section 526(f)(3) as raising "some de facto revenue to the government." Pl.'s Resp. to Def.'s First Mot. to Dismiss 13. Section 526(f), which imposes civil fines associated with seizures of imported counterfeit merchandise, is not, in any ordinary sense, a law providing for revenue from imports.

D. Subject Matter Jurisdiction Is Available under 28 U.S.C. § 1581(i)(4)

Plaintiff invokes jurisdiction under 28 U.S.C. § 1581(i)(3) and (4), under which the Court of International Trade has jurisdiction of any civil action against the United States that arises out of any law of the United States providing for "embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety" or arises out of any law of the United States providing for "administration and enforcement with respect to the matters referred to" in, *inter alia*, § 1581(i)(3). First Am. Compl. ¶¶ 2-3; *see* 28 U.S.C. § 1581(i)(3)-(4). The court concludes that plaintiff has pleaded facts sufficient to bring its case within 28 U.S.C. § 1581(i)(4).

The threshold question is whether plaintiff's case arises out of subsection (e) of Section 526, which is a seizure and forfeiture provision applying to imported merchandise bearing counterfeit marks, or out of subsection (f), which is a related, but separate, provision subjecting to a civil fine any person who directs the importation of merchandise for sale or public distribution that is seized under Section 526(e). Plaintiff appears to characterize its case as arising out of Section 526(e). Plaintiff refers in its amended complaint to "the 19 U.S.C. 1526 Import Prohibition and seizure provisions as to violative goods" and describes these provisions as amounting "to an 'embargo' or 'other quantitative restriction' in terms of 28 U.S.C. 1581(i)(3) as an Import Prohibition of a class of violative goods that are subject to government exclusion from the Customs Territory." First Am. Compl. ¶ 2.

Despite plaintiff's characterization, the court concludes that Sakar's civil action arises out of Section 526(f), not Section 526(e). Because Section 526(e) is a seizure and forfeiture provision, not a civil penalty provision, an action that arises solely out of Section 526(e) would be an *in rem* seizure and forfeiture proceeding. An action arising out of Section 526(f) is of a different character in that it necessarily entails an *in personam* civil penalty proceeding. Plaintiff's case is *in personam* in character because it contests the liability of Sakar for a civil fine. Any *in rem* cause of action on which Sakar ever could have sued in any court to contest the seizure and forfeiture of its goods was extinguished when the administrative forfeiture of its merchandise became "final," *i.e.*, no longer

appealable. The extinguishing event occurred when Sakar waived its right to request that the United States commence a judicial forfeiture proceeding to adjudicate whether the United States could take title to the imported merchandise. The court concludes that plaintiff has not pleaded facts sufficient to state a case arising out of the seizure and forfeiture provision established in Section 526(e). It follows that jurisdiction over plaintiff's case does not lie solely under 28 U.S.C. § 1581(i)(3). The court's jurisdictional analysis, however, cannot end there.

The court is granted jurisdiction under 28 U.S.C. § 1581(i)(4) of cases against the United States that arise out of a law providing for "administration and enforcement" of the matters referred to in § 1581(i)(3), which matters would include an "embargo" within the meaning of the latter provision. Therefore, the court next considers whether § 1581(i)(4) would confer jurisdiction over plaintiff's case if Section 526(e) were deemed to provide for "embargoes or other quantitative restrictions" within the meaning of those terms as used in 28 U.S.C. § 1581(i)(3). As to this question, the parties disagree. Plaintiff argues that Section 526(e) imposes an embargo in banning counterfeit goods from entry into the Customs territory. Pl.'s Resp. to Def.'s Second Mot. to Dismiss 17. Defendant relies on the Supreme Court's holding in *K Mart Corp.* for the proposition that Section 526(e) does not create an "embargo" within the meaning of 28 U.S.C. § 1581(i)(3) and also argues that jurisdiction does not exist thereunder because the district courts, not the Court of International Trade, are granted

jurisdiction to hear seizure and forfeiture cases. Def.'s Second Mot. to Dismiss 22-25 (citing *K Mart Corp.*, 485 U.S. at 184-85).

The court is not persuaded by defendant's argument that *K Mart Corp.* resolves the question of whether subsection (e) of Section 526 creates an embargo for purposes of 28 U.S.C. § 1581(i)(3). The Court of International Trade, in the somewhat different context of an importer seeking to invoke § 1581(i)(3) jurisdiction for a challenge to a seizure effected under Section 526(e), previously has concluded that Section 526(e), in providing for the seizure of counterfeit goods, does not create an embargo or other quantitative restriction for purposes of § 1581(i)(3). *CDCOM (U.S.A.) Int'l, Inc.*, 21 CIT at 440, 963 F. Supp. at 1218-19. Defendant cites to *CDCOM (U.S.A.) Int'l, Inc.* in support of its motion to dismiss. Def.'s Second Mot. to Dismiss 24-25. The narrow question of whether subsection (e) of Section 526 creates an "embargo" within the meaning of that term as used in 28 U.S.C. § 1581(i)(3) is, however, one that the Supreme Court did not have occasion to consider in *K Mart Corp.*, and on which the Court of Appeals for the Federal Circuit has not ruled. The Supreme Court's conclusion in *K Mart Corp.* that the Customs regulations interpreting Section 526(a) could not be challenged in the Court of International Trade under 28 U.S.C. § 1581(i)(3) rested on the Court's view that an embargo did not result from subsection (a) of Section 526. *See* 485 U.S. at 185-90. Subsection (e) of Section 526 was not relevant to that analysis.

In *K Mart Corp.*, the Supreme Court concluded that "the ordinary meaning of 'embargo,' and the meaning that Congress apparently adopted in the statutory language 'embargoes or other quantitative restrictions,' is a governmentally imposed quantitative restriction–of zero–on the importation of merchandise." *Id.* at 185 (quoting 28 U.S.C. § 1581(i)(3)). "An importation prohibition is not an embargo if rather than reflecting a *governmental* restriction on the quantity of a particular product that will enter, it merely provides a mechanism by which a private party might, at its own option, enlist the Government's aid in restricting the quantity of imports in order to enforce a private right." *Id.* Subsection (a) of Section 526, according to the Supreme Court, relates to enforcement of a private right and is very different from an embargo because, in addition to the trademark owner, any other importer having the owner's consent may import the good without limitation. *Id.* at 185-86.

Subsection (e) of Section 526 protects the rights of owners of genuine trademarks from importations of counterfeit goods, but the scope of the provision is much broader than that. It provides that any merchandise imported into the United States in violation of 15 U.S.C. § 1124 "shall be seized." 19 U.S.C. § 1526(e). Under 15 U.S.C. § 1124, a provision of the Lanham Act, no article of imported merchandise bearing a counterfeit trademark, as defined therein, "shall be admitted to entry at any customhouse of the United States." 15 U.S.C. § 1124. The provision incorporates only a limited exception for classes of articles, as identified by regulation

under Section 526(d), that are imported by travelers for personal use. *Id.*; *see* 19 U.S.C. § 1526(d). Thus, Section 526(e) and the related provision of 15 U.S.C. § 1124 together establish a general prohibition on the importation of, and the exclusion from entry of, counterfeit merchandise, and both form the predicate for assessment of civil fines under Section 526(f). This statutory scheme does not permit the owner of a trademark to import counterfeits of its trademarked merchandise. Nor does it permit goods bearing a counterfeit trademark to be released into commerce, even with the consent of the owner of the genuine trademark. The trademark owner's consent has the effect under subsection (e) only of allowing, in the discretion of the Treasury Secretary, a limited exception to the required forfeiture and destruction of merchandise already seized: if the owner consents, and the counterfeit trademark is obliterated, the merchandise may be donated to a government agency or eleemosynary organization or, if no such agency has a need for the merchandise, sold by Customs at public auction. 19 U.S.C. § 1526(e).

The reason for the import restraint of subsection (e) of Section 526 differs from that of subsection (a). As the Supreme Court observed in *K Mart Corp.*, the subsection (a) import control does not reflect what the Supreme Court considered to be a "governmental" restriction but instead provides a mechanism by which a private party might, at its own option, enlist the government's aid in restricting the quantity of imports bearing the genuine trademark in order to enforce a private right. *See K Mart Corp.*, 485 U.S. at 185. Prohibiting the importation of goods bearing a counterfeit, as

opposed to genuine, trademark not only serves the private interest of the trademark owner but also reflects the government's interest in the strict enforcement of intellectual property law to protect the U.S. economy and to protect the consuming public from the effects of a counterfeit good. *See* Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, § 2, 110 Stat. 1386, 1386 (1996) ("Anticounterfeiting Act"). For these reasons, the court concludes that the statutory scheme controlling the importation of counterfeit merchandise that is established by subsection (e) of Section 526 and the related provision of 15 U.S.C. § 1124 is sufficiently dissimilar to subsection (a) of Section 526 that the Supreme Court, in *K Mart Corp.*, cannot be considered to have decided the question of whether Section 526(e) and 15 U.S.C. § 1124 impose an "embargo" within the meaning of that term as used in 28 U.S.C. § 1581(i)(3).

The Supreme Court's discussion in *K Mart Corp.* is instructive in describing the widelyvarying forms in which embargoes may be fashioned. "An embargo is a '[g]overnment order prohibiting commercial trade with individuals or businesses of other nations.'" 485 U.S. at 184 (quoting Black's Law Dictionary 468 (5th ed. 1979)). "It is '[a] policy which prevents goods from entering a nation' and which 'may be imposed on a product or on an individual country.'" *Id.* (quoting J. Berenyi, The Modern American Business Dictionary 103 (1982)). The Supreme Court's opinion in *K Mart Corp.* noted that "embargoes" as referred to in 28 U.S.C. § 1581(i)(3) are not confined to "embargoes that are grounded in trade policy" but typically serve a governmental

purpose in being directed to specific categories of goods, for example, public health or safety, morality, law enforcement, foreign affairs, or ecology. *Id.* Section 526(e) incorporates by reference, and enforces through seizure and forfeiture, the specific exclusion from entry that the Lanham Act, in 15 U.S.C. § 1124, applies to imported merchandise bearing counterfeit trademarks. Together, the two statutory provisions establish an import control that falls within the definitions of "embargo" on which the Supreme Court based its analysis of Section 526(a) and 28 U.S.C. § 1581(i)(3).

The next question is whether the embargo established by Section 526 and 15 U.S.C. § 1124 falls within the broader terms of 28 U.S.C. § 1581(i)(3), which grants the Court of International Trade jurisdiction over cases arising under a law providing for "embargoes . . . for reasons *other than* the protection of the public health or safety." 28 U.S.C. § 1581(i)(3) (emphasis added). Subsection (e) was added to Section 526 by the Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, § 211, 92 Stat. 888, 903-04 (1978). The text of the added subsection (e) demonstrated that Congress, in enacting import prohibitions on merchandise bearing counterfeit marks, was aware that counterfeit merchandise could pose a risk to public health and safety. The added subsection (e) provided that "merchandise bearing a counterfeit mark . . . shall be seized and, in the absence of the written consent of the trademark owner, forfeited for

violations of the customs laws." *Id.*[13] Subsection (e) allowed four alternatives for the disposal of the goods seized. *Id.* The fourth alternative required disposal by destruction "if the merchandise is unsafe or a hazard to health." *Id.*; *see* 19 U.S.C. § 1526(e)(4) (1982).

Subsection (e) remained unchanged until Congress, in enacting the Anticounterfeiting Act in 1996, amended the section to modify subsection (e)

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[13] Upon the amendment of Section 526 in 1978 to add subsection (e), subsection (e) provided in relevant part:

> Any such merchandise bearing a counterfeit mark . . . shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws. Upon seizure of such merchandise, the Secretary shall notify the owner of the trademark, and shall, after forfeiture, obliterate the trademark where feasible and dispose of the goods seized –
>
> (1) by delivery to such Federal, State, and local government agencies as in the opinion of the Secretary have a need for such merchandise,
>
> (2) by gift to such eleemosynary institutions as in the opinion of the Secretary have a need for such merchandise,
>
> (3) more than 1 year after the date of forfeiture, by sale by appropriate customs officers at public auction under such regulations as the Secretary prescribes, except that before making any such sale the Secretary shall determine that no Federal, State, or local government agency or eleemosynary institution has established a need for such merchandise under paragraph (1) or (2), or
>
> *(4) if the merchandise is unsafe or a hazard to health, by destruction.*

Customs Procedural Reform and Simplification Act of 1978, § 211, 92 Stat. at 903-04 (emphasis added).

and to add subsection (f), the aforementioned civil penalty provision. Anticounterfeiting Act, §§ 2, 9-10, 110 Stat. at 1386, 1388-89. Section 2 of the 1996 statute set forth as findings that

> [t]he counterfeiting of trademarked and copyrighted merchandise–
> (1) has been connected with organized crime;
> (2) deprives legitimate trademark and copyright owners of substantial revenues and consumer goodwill;
> (3) poses health and safety threats to United States consumers;
> (4) eliminates United States jobs; and
> (5) is a multibillion-dollar drain on the United States economy.

Id. § 2, 110 Stat. at 1386. Thus, Congress indicated in Section 2 that protection of the public health and safety from risks associated with counterfeit merchandise was a matter of concern. The 1996 amendments modified subsection (e) by integrating subsection (e)(4) into the main portion of subsection (e), thereby requiring generally the destruction of merchandise bearing a counterfeit trademark and allowing an exception to destruction only "if the merchandise is not unsafe or a hazard to health." *Id.*

§ 9, 110 Stat. at 1388.[14] Specifically, under subsection (e) as amended, only if the merchandise was determined not to be unsafe and not a hazard to health could the Secretary, upon obtaining the consent of the trademark owner, "obliterate the trademark where feasible and dispose of the goods seized" via one of the three remaining alternatives in subsection (e). *Id.*; 19 U.S.C. § 1526(e).

The enactment of the 1996 amendments to Section 526(e) demonstrates that protection of the public health and safety was among the reasons for

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[14] As amended in 6 1996, Section 526(e) provided in relevant part:

Any such merchandise bearing a counterfeit mark . . . shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws. Upon seizure of such merchandise, the Secretary shall notify the owner of the trademark, and shall, after forfeiture, destroy the merchandise. Alternatively, *if the merchandise is not unsafe or a hazard to health*, and the Secretary has the consent of the trademark owner, the Secretary may obliterate the trademark where feasible and dispose of the goods seized –
(1) by delivery to such Federal, State, and local government agencies as in the opinion of the Secretary have a need for such merchandise,
(2) by gift to such eleemosynary institutions as in the opinion of the Secretary have a need for such merchandise, or
(3) more than 90 days after the date of forfeiture, by sale by the Customs Service at public auction under such regulations as the Secretary prescribes, except that before making any such sale the Secretary shall determine that no Federal, State, or local government agency or eleemosynary institution has established a need for such merchandise under paragraph (1) or (2).

See Anticounterfeiting Act, § 9, 110 Stat. at 1388 (emphasis added).

maintaining and expanding the statutory regime directed against the importation of counterfeit merchandise. But it also demonstrates that Congress, in Section 526(e), was furthering not only private trademark rights but also governmental objectives that are distinct from the protection of public health and safety, including preserving jobs in the United States and preventing a multibillion-dollar drain on the United States economy.

Neither the plain meaning nor the legislative history of 28 U.S.C. § 1581(i)(3) indicates that Congress intended to exclude from the jurisdiction of the Court of International Trade cases arising out of a law providing for an embargo for which *any* reason relates to the public health or safety. To the contrary, the report of the House Committee on the Judiciary on the Customs Courts Act of 1980, in discussing the mark-up of the bill, H.R. 7540, that resulted in § 1581(i)(3) in its current form, explained that the draft jurisdictional provision as set forth in the previous version of the bill had generated concerns of witnesses, specifically the American Importers Association, that the Court of International Trade would exercise jurisdiction of civil actions under the Federal Food, Drug and Cosmetic Act and the Toxic Substances Control Act, that the public health or safety questions thereunder should be treated the same whether a court is dealing with domestic or imported goods, and that such public health or safety questions more appropriately should come within the jurisdiction of the district courts. H.R. Rep. No. 96-1235, at 47-48 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3759. The embargo created by Section 526(e) and the

related 15 U.S.C. § 1124 bars importation and entry of counterfeit goods whether or not those goods pose a threat to public health or safety. That a good could pose a threat to public health or safety related to congressional motivation for the enactment but was not a condition precedent to the exclusion from entry of any specific good. The determination of whether a particular good falls within the embargo requires a court to determine whether the trademark borne by the good is counterfeit within the meaning of the Lanham Act, not whether the good itself poses a threat to the public health or safety. Because questions of health or safety do not arise when a court determines the scope of this embargo, it is not the type of embargo that generated the concern of dual jurisdiction that was expressed in the House committee report. For these several reasons, the court concludes that the embargo created by Section 526(e) in conjunction with 15 U.S.C. § 1124 satisfies the requirement of 28 U.S.C. § 1581(i)(3) that the law in question provide for "embargoes . . . for reasons other than the protection of the public health or safety."

The court disagrees with defendant's argument that plaintiff's case lacks jurisdiction under § 1581(i)(3) because Congress has placed jurisdiction over seizure and forfeiture cases in the district courts. Under 28 U.S.C. § 1355, the district courts are granted jurisdiction generally over forfeiture actions; under 28 U.S.C. § 1356, the district courts possess jurisdiction of "any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction, except matters within the jurisdiction of

the Court of International Trade under section 1582 of this title." 28 U.S.C. §§ 1355, 1356 (2000). Defendant's argument does not take into consideration that the case plaintiff has pleaded does not contest a seizure or a forfeiture effected under Section 526(e) but instead contests liability or potential liability for a civil fine under Section 526(f).

In summary, plaintiff has pleaded facts sufficient to demonstrate that its case arises out of a law, Section 526(f), that in providing for administration and enforcement of the import prohibition established by Section 526(e) and the exclusion from entry required by 15 U.S.C. § 1124, creates an embargo on the importation of counterfeit goods for reasons other than the protection of the public health or safety. The court therefore is granted jurisdiction over the general subject matter of plaintiff's case by 28 U.S.C. § 1581(i)(4).

E. Plaintiff Has Not Stated a Claim upon which Relief Can Be Granted

Defendant asserts various grounds in support of its argument that plaintiff has failed to establish jurisdiction or to state a claim on which relief can be granted. In addition to its arguments pertaining to the scope of 28 U.S.C. § 1581(i), defendant argues that plaintiff has failed to establish standing to sue and, submitting that no final agency action is available for review, that plaintiff's case lacks ripeness. *See* Def.'s Second Mot. to Dismiss 28-31, 36-38.

Under USCIT Rule 8(a)(2), the pleading requirement is satisfied by "a short and plain statement of the claim showing the pleader is entitled to relief." In ruling on a motion to dismiss, the court accepts as true the facts alleged in plaintiff's pleading and construes all inferences in the plaintiff's favor. *See Shearin v. United States*, 992 F.2d 1195, 1195-96 (Fed. Cir. 1993). The court may not dismiss for failure to state a claim unless it appears beyond doubt that the plaintiff could prove no set of facts consistent with the plaintiff's allegations that would entitle the plaintiff to relief. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Sakar's amended complaint and associated submissions, when evaluated under these standards, reveal that Sakar has failed to plead a cause of action under which it would be entitled to relief.

In addition to citing the jurisdictional provision of 28 U.S.C. § 1581(i), plaintiff's amended complaint cites, as the basis for its action, 28 U.S.C. §§ 2632(a), (b), and 2640(e). First Am. Compl. 1. Neither of these sections creates a cause of action. The provisions of § 2632 specify how a civil action is commenced in the Court of International Trade, *i.e.*, generally by the filing of a summons and complaint pursuant to subsection (a) or by the filing of a summons only in the instance of a civil action brought under 19 U.S.C. §§ 1515 or 1516 pursuant to subsection (b). 28 U.S.C. §§ 2632(a)-(b) (2000). The statute, in § 2640(e), defines the scope and standard of review for civil actions not specified in subsections (a) through (d) of that section and, therefore, directs how the Court of International Trade is to review a

matter within the subject matter jurisdiction of § 1581(i). 28 U.S.C. § 2640(e) (2000). In so doing, § 2640(e) does not create a cause of action under which a plaintiff may challenge an agency decision but instead refers to the scope and standards of review applicable under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 (2000). *Id.*

A case brought under the jurisdiction of 28 U.S.C. § 1581(i) may rely for its cause of action on the APA "right of review" provision, 5 U.S.C. § 702, which generally entitles any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . to judicial review thereof." 5 U.S.C. § 702 (2000); *see Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304-06 (Fed. Cir. 2004) (concluding that jurisdiction is proper under 28 U.S.C. § 1581(i)(4) and that an importer has a cause of action under 5 U.S.C. § 702 to challenge the liquidation of entries conducted pursuant to erroneous instructions of the Department of Commerce). Plaintiff's amended complaint does not ascribe Sakar's cause of action to the APA. Even had it done so, the amended complaint would not suffice to state a valid claim under the APA, which limits agency review to "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court . . . ." 5 U.S.C. § 704 (2000). The action taken by Customs in issuing under Section 526(f) the mitigated penalty decision of December 29, 2005 is not expressly made reviewable in a suit against the United States, either by Section 526(f) or by any other statute. To be reviewable under the APA, the agency action being

challenged must be "final" such that it "must mark the consummation of the agency's decisionmaking process" and, in addition, "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks omitted).

The December 29, 2005 letter states that "*this decision constitutes the final administrative review analysis available under the provisions of Part 171 of the Customs Regulations. No further petitions will be accepted.*" First Am. Compl. Ex. 1 at 1 (replying, in the Customs decision dated Dec. 29, 2005, to Sakar's supplemental petition for mitigation of the civil penalty). However, it does not necessarily follow that the December 29, 2005 decision marks the consummation of the agency's decision making process. Under Section 526(f), "[t]he imposition of a fine under this subsection shall be within the discretion of the Customs Service." 19 U.S.C. § 1526(f)(4). By statute, therefore, the United States could initiate no judicial action to recover a penalty unless Customs, in the discretion of the Customs Commissioner, first makes a decision to go forward with such an action, which it would do initially by means of a referral to the Department of Justice. *See* 19 C.F.R. § 171.22 (providing that where payment of a mitigated penalty is not made within the effective date of a mitigation decision, referral will be made to the Department of Justice unless other action has been directed by the Customs Commissioner). Plaintiff's pleading does not indicate that this discretionary decision by Customs has been made; in any event, it cannot be said for certain whether, and

on what alleged facts, the Department of Justice will bring an action in district court on behalf of Customs to recover from Sakar a civil fine under Section 526(f). The Department of Justice may do so only by bringing an action in district court under 28 U.S.C. § 1355(a). That statutory provision grants the district courts original jurisdiction of any action to recover or enforce a civil fine or penalty incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under 28 U.S.C. § 1582. *See* 28 U.S.C. § 1355(a); 28 U.S.C. § 1582 (2000) (excluding Section 526(f) penalties from among those for which a collection action may be instituted in the Court of International Trade).

Accordingly, the facts and circumstances presented in plaintiff's submissions do not establish that the December 29, 2005 decision is the culmination of the Customs decision making process. Even were the court to presume the decision to be such a culmination, plaintiff's case still would be deficient in stating an APA claim. Plaintiff has failed to allege facts under which the court may conclude that the December 29, 2005 decision, after the close of the 30-day effective period of that decision, determined rights or obligations or gave rise to further legal consequences. According to plaintiff's pleadings and documentation, the Customs administrative proceeding was based on findings of fact and conclusions of law made by Customs and culminated in the assessment of a mitigated civil penalty of $67,775. First Am. Compl. ¶¶ 5-7. Sakar did not pay the penalty within the 30 days allowed by Customs for acceptance of the mitigated penalty decision. *See id.* ¶¶ 6-8, Ex. 1 at 1. That decision, as

a result, has expired and is now of no legal effect. *See* 19 C.F.R. § 171.22 (providing that a mitigated penalty decision is in effect for a limited time as specified in the decision and that the failure to pay within the effective period will result in the full penalty being deemed applicable and referral of the claim to the Department of Justice unless the Customs Commissioner determines otherwise).

An action brought by the United States to recover a penalty from Sakar under 28 U.S.C. § 1355(a) would be a *de novo* proceeding before the district court. In granting to the district courts generally the original jurisdiction to hear civil penalty actions, Congress did not allow in 28 U.S.C. § 1355 for a proceeding under which the district court could review on the agency record a matter such as is described in plaintiff's pleading. *See* 28 U.S.C. § 1355; *Griekspoor v. United States*, 433 F. Supp. 794, 799 (M.D. Fla. 1977) (observing in *dicta* that had the government sought to collect a civil penalty under 28 U.S.C. § 1355, "a full dress hearing and trial would have taken place . . . in the District Court."). For these reasons, the findings of fact and conclusions of law that Customs made during the administrative proceeding are no longer of any binding legal effect.

Despite the expired status of the December 29, 2005 decision, the prayer for relief in plaintiff's first amended complaint seeks "a judgment reversing, setting aside, and vacating the agency's December 29, 2005 2X MSRP Civil Penalty Decision determination . . . ." First Am. Compl. 19. Sakar seeks, in the alternative, a declaratory judgment

holding that the civil penalty decision is invalid as contrary to Section 526(f)(3), arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and a denial of due process. *Id.* Sakar essentially asks the Court of International Trade to grant a declaratory judgment on facts, which Sakar has pleaded, that pertain solely to the now-concluded administrative proceeding. In summary, because that proceeding was concluded without a penalty being paid, and because the United States has not asserted any penalty claim under 28 U.S.C. § 1355(a), Sakar has failed to allege facts under which the court could find that the Customs decision now has any effect on Sakar's rights or obligations.

Nor has Sakar alleged any facts pertaining to the December 29, 2005 decision under which that decision has resulted in further legal consequences sufficient to justify APA review. In responding to the motion to dismiss, plaintiff directs the court's attention to a July 23, 2004 letter in which Customs notified Sakar that it had received no response to a notice of penalty of $259,000, dated May 24, 2004, that Customs had sent to Sakar. *See* Pl.'s Resp. to Def.'s First Mot. to Dismiss 27 & Ex. 3. The letter stated that if no response was received within thirty days, "th[e] case will be referred to the Department of Justice for collection action and the Internal Revenue Service where a lien will be placed against your income tax return." *Id.* Ex. 3 at 1. Plaintiff includes with its first amended complaint an affidavit of its Chief Operating Officer referring to the July 23, 2004 letter from Customs and stating that Sakar would be irreparably injured in the event

of a collection action and income tax lien. *Id.* Ex. 5 at 2.

The threat of a collection action and tax lien, as was stated in the July 23, 2004 letter and characterized in the affidavit of Sakar's Chief Operating Officer, does not suffice as an allegation that the December 29, 2005 decision has occasioned legal consequences for Sakar. That letter, according to the May 24, 2004 penalty notice in the amount of $259,000, pertains to Customs penalty case no. 2004-4601-300365-01, which is a different penalty case than the penalty case that is the subject of this action. *See id.* Ex. 3 at 2-3. The penalty case at issue in this action, according to the documentation plaintiff provides, is Customs penalty case no. 2003-4601-300404-01. First Am. Compl. Ex. 1 at 1-2. Plaintiff's submissions do not allege facts or cite to documentation establishing that the United States has imposed, or threatened to impose, a tax lien in the penalty proceeding that forms the basis of plaintiff's claim.

For the foregoing reasons, plaintiff has pleaded no cause of action that could entitle it to relief under the APA. In the absence of a valid APA cause of action, and in the absence of another statute under which the Customs decision of December 29, 2005 is made reviewable, plaintiff's case may proceed beyond the pleadings stage if it alleges facts allowing the court to conclude that Sakar has an available remedy under a "nonstatutory," *i.e.*, constitutional, cause of action. *See Motions Systems Corp. v. Bush*, 437 F.3d 1356, 1359 (2006). Plaintiff's pleadings attempt to assert such a claim in alleging

that the Customs decision was "unconstitutional as a Denial of Due Process of Law." First Am. Compl. 2. The court concludes that this is not a statement of a claim upon which relief can be granted. The December 29, 2005 penalty decision imposed a mitigated penalty of $67,775 but did not state any consequence that would attend the failure of Sakar to pay the mitigated penalty within the 30-day period in which the decision was in effect. *Id.* Ex. 1 at 1. Nor did the decision initiate any further proceeding. As discussed previously, the facts alleged reveal that the seizure and forfeiture of Sakar's merchandise are now final and beyond the jurisdiction of any court to review. The only alleged fact to which plaintiff has directed the court that conceivably could relate to a due process claim involves a threat of a tax lien in an entirely different penalty proceeding. *See* Pl.'s Resp. to Def.'s First Mot. to Dismiss Ex. 3 at 1-2.

F. Plaintiff's Proposed Amendment Fails to Cure the Insufficient Complaint

Finally, the court addresses the remaining issue involving plaintiff's motion to amend its first amended complaint and concludes that the proposed amended complaint does not cure the insufficient pleading of a claim on which relief can be granted. *See* Pl.'s Mot. to Amend First Am. Compl. The court previously discussed this proposed amendment in the context of subject matter jurisdiction. Although, as provided by USCIT R. 15(a), leave to amend a pleading is to be "freely given when justice so requires," a court may deny a motion to amend a

pleading when doing so would be futile. *See United States v. Ford Motor Co.*, 463 F.3d 1286, 1296-98 (Fed. Cir. 2006). In this instance, no purpose would be served by the court's granting plaintiff's motion to amend its complaint.

In the proposed amendment, plaintiff seeks to allege additional facts pertaining to a denial of a protest as the predicate on which plaintiff would have the court exercise jurisdiction under 28 U.S.C. § 1581(a). Pl.'s Mot. to Amend First Am. Compl. 1-2. Under 19 U.S.C. §§ 1514 and 1515, a plaintiff is expressly given the right to challenge judicially the denial of a protest of any of the specified categories of decisions of Customs. It is, therefore, theoretically possible that a validly pleaded cause of action would have resulted had plaintiff pleaded facts allowing the court to find a valid protest, a denial thereof, and the timely filing of a summons to contest that denial. As discussed previously, the facts as alleged in the first amended complaint, even as augmented by the proposed amendment, are insufficient to establish a basis for jurisdiction under 28 U.S.C. § 1581(a). Plaintiff fails to allege the filing of any document that could constitute a valid protest, and plaintiff did not file a timely summons to challenge what plaintiff alleges was a protest denial. The proposed amendment, accordingly, fails to cure plaintiff's failure to plead a claim entitling it to relief.

III. CONCLUSION

Plaintiff's first amended complaint, whether considered alone or in conjunction with its proposed amendment thereto, fails to state a claim on which

the court could grant relief. Plaintiff has asserted no valid cause of action under the APA or any other statute. There is no set of facts that plaintiff could prove that would entitle it to relief consistent with the constitutional due process claim that plaintiff has stated in its pleadings. Plaintiff's motion to amend its first amended complaint does not allege facts sufficient to cure the defective pleading and therefore is futile. Judgment granting defendant's motion to dismiss and denying for futility plaintiff's motion to amend the complaint will be entered accordingly.

/s/ Timothy C. Stanceu
Timothy C. Stanceu
Judge

Dated: December 12, 2006
New York, New York

SAKAR INTERNATIONAL, INC.,
Plaintiff,

v.

UNITED STATES,
Defendant.

UNITED STATES COURT OF INTERNATIONAL TRADE

[entered December 12, 2006]

Before: Timothy C. Stanceu, Judge

Court No. 06-00025

JUDGMENT

Upon review of plaintiff's first amended complaint, defendant's motion to dismiss the first amended complaint, plaintiff's subsequent motion to amend its first amended complaint, and all other pertinent filings herein, after due deliberation and in conformity with the Opinion issued in these proceedings, it is hereby

ORDERED that defendant's motion to dismiss the complaint is hereby granted for the failure of the first amended complaint to state a claim on which relief can be granted; it is further

ORDERED that plaintiff's motion to amend its first amended complaint is hereby denied for futility; and it is further

ORDERED that this action is dismissed.

/s/ Timothy C. Stanceu
Timothy C. Stanceu
Judge

Dated: December 12, 2006
New York, New York

[Entered April 11, 2008]

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2007-1173

SAKAR INTERNATIONAL, INC.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of International Trade in case no.06-00025, Judge Timothy C. Stanceu.

ORDER

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on April 18, 2008.

FOR THE COURT,

s/_Jan Horbaly_____
Jan Horbaly
Clerk

Dated: 04/11/2008

cc: James C. Tuttle
Domenique Kirchner

SAKAR INTL V US, 2007-1173
(CIT - 06-00025)

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SEP 26 2008

No. 08-26

In the Supreme Court of the United States

SAKAR INTERNATIONAL, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
JEANNE E. DAVIDSON
DOMENIQUE KIRCHNER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BRIAN MORRIS
Senior Attorney
Customs and Border Protection
Department of Homeland Security
Washington, D.C. 20229

QUESTION PRESENTED

Whether the Court of International Trade possessed jurisdiction to review Customs and Border Protection's assessment against petitioner of a mitigated penalty, pursuant to 19 U.S.C. 1526(f), for importing counterfeit merchandise in violation of 19 U.S.C. 1526(e).

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In the Supreme Court of the United States

No. 08-26

SAKAR INTERNATIONAL, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 516 F.3d 1340. The opinion of the Court of International Trade (Pet. App. 24-61) is reported at 466 F. Supp. 2d 1333.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 2008. A petition for rehearing was denied on April 11, 2008 (Pet. App. 64-65). The petition for a writ of certiorari was filed on July 2, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 28 U.S.C. 1581(i), the Court of International Trade is vested with "exclusive jurisdiction of any civil action commenced against the United States, its agen-

cies, or its officers, that arises out of any law of the United States providing for

> (1) revenue from imports or tonnage;
>
> * * * * *
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection.

28 U.S.C. 1581(i)(1), (3) and (4). Thus, the court is granted exclusive jurisdiction of cases against the United States that arise out of any law providing for "administration and enforcement" of matters referred to in paragraph (3) of Section 1581(i), which include "embargoes," as well as matters referred to in paragraph (1), which include "revenue from imports." *Ibid.*

Section 526 of the Tariff Act of 1930, 19 U.S.C. 1526, outlaws the importation of foreign merchandise bearing an unlicensed American trademark. Subsection (a) of that statute makes it "unlawful to import into the United States any merchandise of foreign manufacture if such merchandise * * * bears a [registered] trademark" of an American citizen or corporation "unless written consent of the owner of such trademark is produced at the time of making entry." 19 U.S.C. 1526(a). Subsection (e) provides, in turn, that "[a]ny such merchandise bearing a counterfeit mark" in violation of the Lanham Act, 15 U.S.C. 1124, "shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws." 19 U.S.C. 1526(e).

In addition to the seizure and forfeiture of the merchandise, 19 U.S.C. 1526(f) provides for the assessment of a civil fine or penalty against "[a]ny person who directs, assists financially or otherwise, or aids and abets the importation of merchandise for sale or public distribution that is seized under subsection (e)." 19 U.S.C. 1526(f)(1). With respect to the particular amount of such fine or penalty, Section 1526(f) mandates that:

> (2) For the first such seizure, the fine shall be not more than the value that the merchandise would have had if it were genuine, according to the manufacturer's suggested retail price, determined under regulations promulgated by the Secretary [of the Treasury].
>
> (3) For the second seizure and thereafter, the fine shall be not more than twice the value that the merchandise would have had if it were genuine, as determined under regulations promulgated by the Secretary [of the Treasury].

19 U.S.C. 1526(f)(2) and (3).

United States Customs and Border Protection (CBP), a component of the Department of Homeland Security,[1] is vested with "discretion" over the imposition of such civil fines or penalties. 19 U.S.C. 1526(f)(4). CBP has promulgated a series of regulations setting forth the various procedures applicable to the seizure

---

[1] On March 1, 2003, the Customs Service was renamed United States Customs and Border Protection and transferred into the Department of Homeland Security. 6 U.S.C. 542 note. All authorities previously delegated by the Department of Treasury to the Customs Service were redelegated to the Department of Homeland Security, and subsequently redelegated to United States Customs and Border Protection. 68 Fed. Reg. 28,322 (2003).

and forfeiture of merchandise imported in contravention of 19 U.S.C. 1526, and the assessment of civil fines and penalties in connection with such importations. 19 C.F.R. Pt. 133. The regulations also establish a detailed set of procedures that govern an importer's filing of a petition and a supplemental petition seeking administrative relief from any fine, penalty, or forfeiture imposed pursuant to 19 U.S.C. 1526, as well as CBP's exercise of its authority to mitigate any such fine, penalty, or forfeiture. 19 C.F.R. 133.21(e); 19 C.F.R. Pt. 171.

2. On October 7, 2002, petitioner entered 500 travel chargers for personal digital assistants (PDAs) and 2311 mini-keyboards for PDAs, all of which were products of the People's Republic of China. Pet. App. 3. On December 18, 2002, CBP seized that merchandise for alleged violations of 19 U.S.C. 1526(e). Pet. App. 3-4. In particular, CBP concluded that importation of the merchandise violated 19 U.S.C. 1526(e) because the travel chargers bore a counterfeit mark of Underwriters Laboratories (UL) and the keyboards displayed, on a function key, a counterfeit "Flying Window" trademark of the Microsoft Corporation. Pet. App. 4.

CBP notified petitioner of the seizure and informed it that the goods would be forfeited and disposed of unless the trademark owners consented in writing to the importation of the goods. Pet. App. 4. Neither UL nor Microsoft provided such consent. *Ibid.* As a result, on August 28, 2003, CBP destroyed the imported merchandise. *Ibid.*

CBP issued petitioner a notice of penalty under 19 U.S.C. 1526(f). Pet. App. 4-5. CBP based its calculation of the fine upon a finding that petitioner had incurred penalties for two prior violations of Section 1526. *Id.* at 5 n.3. CBP originally determined the penalty amount to

be $381,500 and later mitigated the penalty to half that amount, or $190,750. *Id.* at 4-5. CBP subsequently lowered its determination of the manufacturer's suggested retail price (MSRP) from $190,750 to $67,775, assessed a penalty at twice that amount, and then mitigated the penalty by 50% to arrive at a penalty amount of $67,775. *id.* at 4-5, 27-28.

3. Petitioner filed suit in the Court of International Trade. Petitioner alleged that CBP had acted contrary to law in initially concluding that the goods were counterfeit and in subsequently calculating the MSRP of the goods after seizing them. Pet. App. 5. CBP moved to dismiss the complaint for lack of subject matter jurisdiction, or alternatively, for failure to state a claim upon which relief could be granted. *Id.* at 6.

The Court of International Trade held that it possessed jurisdiction over petitioner's claim under 28 U.S.C. 1581(i)(3) and (4). Pet. App. 38-51. Specifically, the court held that CBP's seizure of petitioner's goods amounted to an "embargo[]" within the meaning of Section 1581(i)(3), and that CBP's assessment of a fine related to the "administration and enforcement" of an embargo within the meaning of Section 1581(i)(4). *Id.* at 50-51. The court then granted the government's motion to dismiss for failure to state a claim upon which relief could be granted. *Id.* at 51-59. The court held that CBP's penalty determination did not constitute "final agency action" within the meaning of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, because CBP and the Department of Justice retained discretion over the decision whether to sue petitioner in district court to collect the fine. Pet. App. 54-55.

4. Petitioner appealed to the Court of Appeals for the Federal Circuit, which vacated the trial court's deci-

sion on the ground that the Court of International Trade lacked jurisdiction to entertain petitioner's suit. Pet. App. 1-22. In ruling that the trial court had erred in its jurisdictional determination, the court of appeals held that 19 U.S.C. 1526(e) does not create an "embargo[]"—a governmentally imposed quantitative limit on importation—within the meaning of 28 U.S.C. 1581(i)(3). Rather, under Section 1526(e), the trademark owner, not the government, retains ultimate control over whether or not counterfeit merchandise is actually imported. Pet. App. 15-18.

The court of appeals also held that the trial court had correctly rejected petitioner's alternative theory that jurisdiction was proper in the Court of International Trade under 28 U.S.C. 1581(i)(1) and (4) because CBP's notice of penalty constituted enforcement of a law relating to "revenue from imports." Pet. App. 18-20. The court of appeals held that Section 1526(f) is not in any ordinary sense a law providing for "revenue from imports" within the meaning of Section 1581(i)(1), and that it is not related to "administration and enforcement" of a law providing for revenue from imports within the meaning of Section 1581(i)(4). *Id.* at 19-20. The court also rejected the argument that petitioner was entitled to "non-statutory, judicially granted" review. *Id.* at 20-21.

ARGUMENT

Petitioner contends that the court of appeals' jurisdictional holding is erroneous because (1) enforcement of the trademark laws through seizure of counterfeit goods under Section 1526(e) constitutes an "embargo" within the meaning of 28 U.S.C. 1581(i)(3) (Pet. 11-21), and (2) CBP's notice of penalty under Section 1526(f)

constituted action related to "revenue from imports" within the meaning of 28 U.S.C. 1581(i)(1) (Pet. 21-28). The court of appeals' jurisdictional ruling is correct and does not conflict with any decision by this Court or any other court of appeals. Further review is therefore unwarranted.

1. The court of appeals properly applied this Court's decision *K Mart Corp.* v. *Cartier, Inc.*, 485 U.S. 176 (1988), in holding that CBP's enforcement of the rights of trademark holders pursuant to 19 U.S.C. 1526(e) does not constitute an "embargo[]" within the meaning of 28 U.S.C. 1581(i)(3). In *K Mart*, the Court held that Section 1581(i)(3) did not vest the Court of International Trade with jurisdiction over a challenge to a regulation permitting entry of certain "gray market" goods, the importation of which was allegedly prohibited by 19 U.S.C. 1526(a). The Court adhered to the "ordinary" meaning of the term "embargo," *i.e.*, "a governmentally imposed quantitative restriction—of zero—on the importation of merchandise," *K Mart*, 485 U.S. at 185, examples of which included prohibitions against importation of items in order to protect the public health, safety, or morality, or to promote the government's interests in foreign affairs, law enforcement, or protection of the environment. See *id.* at 184. The Court made clear, however, that "not every governmental importation prohibition is an embargo." *Id.* at 187. The Court held, in particular, that enforcement of the importation prohibition under Section 1526(a) was not an "embargo" because, "rather than reflecting a *governmental* restriction on the quantity of a particular product that will enter, it merely provides a mechanism by which a private party might, at its own option, enlist the Government's

aid in restricting the quantity of imports in order to enforce a private right." *Id.* at 185.

The Federal Circuit correctly found that the holding in *K Mart* applies to Section 1526(e) as well as Section 1526(a). Whereas Section 1526(a) establishes a substantive prohibition against importing goods in violation of trademark rights, Section 1526(e) establishes a means for enforcing such a prohibition against importing counterfeit goods. There is no basis for petitioner's contention that while the substantive prohibition against importation is not an embargo, see *K Mart*, 485 U.S. at 185, the enforcement of such a prohibition through seizure of the merchandise does constitute an embargo.

Petitioner seeks (Pet. 16-21) to distinguish *K Mart* by arguing that the importation prohibitions arising under Section 1526(e) operate independently from the actions of any trademark owner. But, as the court of appeals explained (Pet. App. 14-18), petitioner is incorrect because, under Section 1526(e), "the trademark owner, not the government, retains ultimate control over whether or not the 'counterfeit' merchandise is imported." *Id.* at 15-16. Under the plain language of the statute and its implementing regulations, merchandise bearing a counterfeit mark is not forfeited if the trademark owner consents in writing to its importation. 19 U.S.C. 1526(e) ("merchandise * * * shall be seized and, in the absence of the written consent of the trademark owner, forfeited"); 19 C.F.R. 133.21(e) (forfeiture may not occur if trademark owner "provides written consent to importation"). And because seized goods may subsequently be released for importation upon consent of the trademark owner, petitioner is also wrong in suggesting that the government's initial act of seizing mer-

chandise amounts to a quantitative restriction on importation. *Ibid.*[2]

Thus, as with Section 1526(a), which this Court held in *K Mart* did not constitute an "embargo," Section 1526(e) simply provides a mechanism by which a private party might choose to enlist the government's aid in order to restrict a quantity of imports in furtherance of that party's private rights. Pet. App. 16-18. The court of appeals' decision correctly applies this Court's precedent and does not conflict with the decision of any other court of appeals.[3] Further review is therefore unwarranted.

2. The court of appeals also properly rejected (Pet. App. 20) petitioner's argument (Pet. 21-28) that the Court of International Trade has jurisdiction under 28 U.S.C. 1581(i)(4) to review CBP's notice of penalty pursuant to Section 1526(f) on the theory that the notice constitutes enforcement of a law providing for "revenue

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[2] Moreover, the trademark owner rather than the government even exercises control over whether there is an initial seizure. As the court of appeals noted (Pet. App. 18 n.7), the use of the phrase "such merchandise" in Section 1526(e) implies a reference to the first use of the term "merchandise" in Section 1526(a), which by its plain language prohibits the importation of trademark-bearing merchandise only in the absence of written consent of the trademark owner.

[3] The only contrary authority appears to be an unpublished district court opinion that held, following the now-vacated Court of International Trade's decision in this case, that suits relating to seizure of goods under Section 1526(e) come within the Court of International Trade's exclusive jurisdiction pursuant to Section 1581(i)(3) and (4). See *Pacific Channels Groups* v. *DHS*, No. 07-2106, 2007 WL 4232978, *4-*5 (D.N.J. Nov. 29, 2007). Notably, the United States did not urge that position in *Pacific Channels*, but instead argued, as it did in the trial court here, that there was no final agency action subject to judicial review. See 07-2106 Mem. in Support of Mot. to Dismiss 8-10.

from imports," 28 U.S.C. 1581(i)(1). As both the Court of International Trade and the Federal Circuit correctly observed, "section 1526(f) is not 'in any ordinary sense' a law providing for revenue from imports," Pet. App. 20 (quoting *id.* at 38), but instead authorizes the imposition of civil penalties against those who attempt to infringe the private rights of trademark holders. *Ibid.* That conclusion is further supported by the provision's legislative history. *Ibid.* (citing S. Rep. No. 177, 104th Cong., 1st Sess. 2 (1995); H.R. Rep. No. 556, 104th Cong., 2d Sess. 1-2 (1996)). Although petitioner cites a number of cases (Pet. 22-23) that, according to petitioner, reflect a broad construction of the Court of International Trade's subject matter jurisdiction under 28 U.S.C. 1581(i)(1) and (4), none of those cases supports a finding of jurisdiction under Section 1581(i)(4) with respect to a notice of penalty under Section 1526(f) for importing counterfeit goods in violation of a trademark owner's rights.

Petitioner places primary reliance (Pet. 22, 23-28) on the Federal Circuit's decision in *Conoco, Inc.* v. *United States Foreign-Trade Zones Board*, 18 F.3d 1581 (1994), but that case is easily distinguishable. In *Conoco*, refinery operators sought review of orders of the Foreign Trade Zones Board requiring the operators to pay, as a condition of the Board granting the operators special foreign subzone status, duties on foreign crude oil used in the refineries, calculated by reference to the value of the crude oil rather than the refined product. *Id.* at 1583. In upholding the Court of International Trade's jurisdiction over the dispute as one arising out of laws providing for "revenue from imports or tonnage" within the meaning of Section 1581(i)(1), the Federal Circuit reasoned that "[t]he foreign-trade zones arise under laws designed to deal with revenue from imports, and

they provide a special mechanism for determining revenue from materials imported into these zones." *Id.* at 1588. Indeed, the court stated that there was "little ground for dispute" that a suit about application of the foreign-trade zone laws concerned the administration of laws related to revenue from imports. *Id.* at 1589. The Federal Circuit in *Conoco* distinguished this Court's decision in *K Mart*, noting that *K Mart* related to the enforcement of the rights of trademark owners. *Ibid.* Thus, there is no conflict between the court of appeals' decision in this case and its holding in *Conoco*.

The other cases relied upon by petitioner (Pet. 23) are similarly inapposite. In each of those cases, the question presented was whether some administrative decision affecting entities that participate in the importation process was sufficiently "intertwined with and directly related to the *administration and enforcement* of the laws providing for revenue from imports" to come within the grant of jurisdiction in Section 1581(i)(1) and (4). *Di Jub Leasing Corp.* v. *United States*, 505 F. Supp. 1113, 1117 (Ct. Int'l Trade 1980). The court held in those cases that the regulations at issue were related to securing revenue from imports. See *id.* at 1116 ("the primary objective of licensing and bonding cartmen and lightermen is to secure the revenue from imports on which customs duties have not yet been paid"); see also *United States* v. *Bar Bea Truck Leasing Co.*, 713 F.2d 1563, 1566 (Fed. Cir. 1983) (agreeing with *Di Jub Leasing*); *National Customs Brokers & Forwarders Ass'n* v. *United States*, 731 F. Supp. 1076, 1078 (Ct. Int'l Trade 1990) (action regarding ability of brokers to make entry of shipments was within the scope of Section 1581(i)(1) and (4) because "[t]he entry process is the key administrative act leading to the * * * collection of revenues

from imports"); *Air Cargo Servs., Inc.* v. *United States*, 678 F. Supp. 296 (Ct. Int'l Trade 1988) (licensing of container station); *National Bonded Warehouse, Ass'n* v. *United States*, 706 F. Supp. 904 (Ct. Int'l Trade 1989) (fees charged bonded warehouses). None of those decisions is relevant to this case because, as the court of appeals held, the assessment of a penalty pursuant to Section 1526(f) does not lead to the collection of revenue from imports. Pet. App. 20.

3. There is also no merit to petitioner's argument (Pet. 28-30) that the Federal Circuit's ruling conflicts with the presumption of judicial review of agency action. The court of appeals did not hold that there could be no judicial review of CBP's decision, but only that Section 1581 did not authorize the Court of International Trade to hear petitioner's challenge. Pet. App. 20-21.

Petitioner seeks pre-enforcement judicial review in the Court of International Trade in circumstances where Congress has dictated that the ultimate enforcement action, if one is ever initiated, will occur in the district courts. By statute, the imposition of a penalty under Section 1526(f) lies in the discretion of CBP, see 19 U.S.C. 1526(f)(4), and, by regulation, CBP has provided that no judicial action to recover a penalty will be initiated unless, in an exercise of discretion by the Customs Commissioner, a referral is made to the Department of Justice. 19 C.F.R. 171.22. Because Congress did not grant to the Court of International Trade jurisdiction over actions to collect penalties under Section 1526(f), see 28 U.S.C. 1582, any action by the Department of Justice to collect those penalties must be initiated in the district court. See 28 U.S.C. 1355 (granting the district courts exclusive jurisdiction over actions to collect fines or penalties not granted to the Court of International

Trade under Section 1582); Pet. App. 55. In those circumstances, it would be especially inappropriate to create a non-statutory avenue for pre-enforcement judicial review in a different forum. See *id.* at 20-21.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
GREGORY G. KATSAS
Assistant Attorney General
JEANNE E. DAVIDSON
DOMENIQUE KIRCHNER
Attorneys

BRIAN MORRIS
Senior Attorney
Customs and Border Protection
Department of Homeland Security

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In The Supreme Court of the United States

SAKAR INTERNATIONAL, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF OF PETITIONER

James C. Tuttle
Counsel of Record
TUTTLE LAW OFFICES
82 Wall Street, Suite 1105
New York, New York 10005
(212) 742-7965

Counsel for Petitioner

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement filed at p. ii of the petition for writ of certiorari on July 2, 2008, is still currently correct in that no parent or any publicly held company owns 10% or more of the petitioner corporation's stock within terms of the Court's Rule 29.6.

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PETITIONER'S REPLY BRIEF

1. Independent "embargo" law jurisdiction exists here for the CIT.

Contrary to respondent's contention at p. 7 of its Brief In Opposition ("Brief"), the court of appeals below ("CAFC ") has erroneously applied this Court's decision in *Kmart Corp. v. Cartier, Inc.*, 485 U.S. 176, 108 S. Ct. 950, 99 L. Ed. 2d 151 (1988), in rejecting Court of International Trade ("CIT") "embargo law" residual jurisdiction under 28 U.S.C. § 1581(i)(3) and (4). The CAFC decision conflicts with the Court's decision in *Kmart*, and conflicts with the CIT jurisdiction statute.

Contrary also to respondent's argument that the 19 U.S.C. § 1526(e) embargo ban is a mere mechanism by which a private party (trademark owner) might "enlist" the Government's aid in restricting the quantity of imports in order to enforce a private right, the § 1526(e) embargo-ban was mandated by Congress' own pre-emptive statutory 'enlistment' of a Governmental embargo. The § 1526(e) Government-generated embargo here is applied by its terms without any pre-requisite private party action (*i.e.*, no requirement of mark registration with USPTO and recordation with Customs that are required for § 1526(a) to operate). The 19 U.S.C. § 1526(a) statute discussed in *Kmart* is, on the other hand, wholly preconditioned, is completely individual private party trademark owner-generated, and is subjunctive in its express terms—it is a dependent *non*-embargo import regulatory law, dependent solely upon pre-requisite

private trademark owners' dual preliminary actions.[1] Any Customs enforcement action under § 1526(a) is consequently conditioned on, and authorized only when a protected trademark owner has first actively: (1) Registered its mark with the USPTO, and (2) Recorded its registered mark with Customs. Section 1526(e) relevant in this *Sakar* case however, is an *un*-preconditioned Government generated, imposed, and imperative embargo-ban in its terms that compel zero imports of counterfeit trademark goods—it is an independent embargo law.[2]

Kmart's non-embargo, pre-conditioned import restriction is wholly dependent upon prior specific individual trademark owner actions. *Sakar's* embargo-ban here in issue is operative by its terms *in*dependently of any trademark owner actions or inactions. *Kmart* and its § 1526(a) non-embargo majority holding does not apply to the § 1526(e) embargo-ban presented here in the *Sakar* case, contrary to the CAFC panel's holding below. That is because the un-adjudicated § 1526(e) embargo statute here with its expressly incorporated 15 U.S.C. § 1124 statutory provision establishes by its terms a compulsory Government ban within the Court's definition of "embargo" discussed (but not found) in *Kmart*, *ibid.* at 185. The incorporated section 1124 statute is plain in its pertinent terms: " ... *no [proscribed, counterfeit] article shall be admitted to entry* at any customhouse...." 15 U.S.C. § 1124 [Italics added].

---

[1] *See* § 1526(*a*)

[2] *See* § 1526(*e*)

Kmart involved the validity of Customs' regulations governing the lawful admission (*permitting entry*) of trademarked genuine-goods parallel imports where district court jurisdiction was there sought and sustained for a facial challenge to the regulations. Unlike *Kmart* however, the present *Sakar* case seeks CIT judicial review of a specific *ultra vires* Customs HQ final administrative enforcement decision (*i.e.*, the fictionalized-"MSRP" Penalty imposition of December 29, 2005 now in issue) for embargoed goods. This case falls within statutory 28 U.S.C. § 1581(i)(3) and (4) exclusive CIT administration and enforcement jurisdiction over the § 1526(e) embargo-ban (*denying entry*) and expressly inter-related § 1526(f) penalty here that emanate from, "arise out of", the Tariff Act of 1930, 19 U.S.C. §§ 1202-1681b.

There is no basis for respondent's contention, at p. 8 of its Brief, that § 1526(a) provides the "substantive prohibition" linkage to the independent, un-preconditioned § 1526(e) embargo here in issue. Instead, the appropriate substantive linkage actually comes from what the § 1526(e) statute itself expressly provides: "Any such merchandise bearing a counterfeit mark (within the meaning of section 1127 of Title 15) imported into the United States *in violation of the provisions of section 1124 of Title 15, shall be seized...."* 19 U.S.C. § 1526(e) [emphases added]. A purported substantive prohibition linkage of the trademark-owner actuated dependent § 1526(a) import restriction provision to the independent § 1526(e) Governmentally imposed embargo here is therefore contrary to the § 1526(e) statute's own language that expressly refers to the

substantive § 1124 import ban, and is in conflict also with the definition of "embargo" set out in *Kmart*, 485 U.S. 176, 185 ("a governmentally imposed quantitative restriction—of zero—on the importation of merchasndise.").

Respondent also is wrong in suggesting at pp. 8-9 of its Brief, that the § 1526(e) legislative mandate of the Government's act of seizing violative goods is merely a "means" or "mechanism by which a private party might choose to enlist the government's aid ...." This argument overlooks that counterfeited goods are by law, per se legally, precluded from any entry—by mandated Government control under § 1526(e) and its incorporated § 1124 import ban. Thus § 1526(e) is not a "means"; it is an "end" provision. It is a free-standing, independent embargo-ban. Contrary further to the CAFC's holding below, the trademark owner here in *Sakar* does *not* retain any *Kmart*-styled "ultimate control" over whether or not "counterfeit" merchandise itself is imported under the § 1526(e) embargo ban in issue. The CAFC held otherwise below. That was incorrect. For if indeed counterfeit (*not* licensed or consented), the violative goods cannot in any event be lawfully entered into the customs territory under express statutory terms of the § 1526(e) embargo-ban: they "shall be" seized and destroyed, and in any event "...no article of ...[violative counterfeit merchandise] shall be admitted to entry at any customhouse...," under incorporated § 1124.

The CAFC decision here conflicts with the Court's definition of a governmentally imposed

"embargo" in *Kmart*, conflicts with the plain terms of the § 1526(e) embargo statute including its incorporation of the § 1124 entry ban, and thereby conflicts with the § 1581(i)(3) and (4) "embargo law" CIT residual jurisdiction statute.

2. "Revenue law" jurisdiction also exists here for the CIT.

The CAFC below also erroneously rejected CIT "revenue law" residual jurisdiction under 28 U.S.C. § 1581(i)(1) and (4), and conflicts with the circuit's own earlier decision in *Conoco* and with the residual jurisdiction statute.

Despite respondent's argument that, for subject matter jurisdiction, a case or dispute must somehow be "related to" monetary or duty revenue collection for imports or tonnage, the § 1581(i)(1) statute itself does not so provide in its given terms. Exclusive residual subject matter jurisdiction to the CIT exists here in that the present non-monetary claim for judicial review of Customs' administration and enforcement agency action in *Sakar* indeed "arises out of" of a federal law providing for revenue from imports or tonnage: the Tariff Act of 1930 in this case. Subsection 1581(i) and its paragraphs (1) and (4) provide a broad residual jurisdiction enactment that creates a basket of exclusive CIT jurisdiction that covers any "civil action commenced against the United States ... that *arises out of any law of the United States providing for—(1) revenue from imports or tonnage; ...; or (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and*

subsections (a)—(h) of this section." *Sakar* is such a civil action under § 1581(i)(1) and (4), and is a case that in any event conceivably touches and concerns import tonnage and perhaps revenue to the extent that both are reduced by an embargo denial of entry of accused goods. Respondent argues that the CAFC's 1994 decision in *Conoco v. U.S.*, 18 F.3d 1581, 1586 (Fed. Cir. 1994) somehow establishes or reflects a "relates to" revenue collection activity litmus test for § 1581(i)(1) jurisdiction purposes. The government curiously opposed CIT § 1581(i)(1) jurisdiction in the *Conoco* case, where the government's penchant for "jurisdictional ping-pong games" (see *Conoco* excerpts in petition at 23-26) nevertheless led to a CAFC grant of CIT § 1581(i)(1) and (4) jurisdiction for plaintiff Conoco in that FTZB agency administrative action case. With ping-pong style jurisdictional attacks by the government (in both the district court earlier and then also in the CIT in *Conoco*), it seems to become apparent that the government does not favor any one appropriate judicial forum over another as being legally correct or acceptable. The executive branch in general it seems does not favor any case for judicial review or supervision of any agency action in any forum at any time even though such review is strongly presumed by the courts.

Contrary to respondent's attempt to distinguish non-monetary or non-tariff claim cases at p. 11 of its Brief, the courts have readily accorded broad scope "revenue law" jurisdiction to agencies' purely administrative action cases (*i.e.*, non-tariff trade claims or disputes). In the first "revenue law" jurisdiction case to be decided by the CIT under the

Customs Courts Act of 1980, *Di Jub Leasing Corp. v. U.S.*, 1 CIT 42, 505 F. Supp. 1113 (1980), Judge Newman sets out the rationale for broad scope CIT residual jurisdiction under § 1581(i)(1) and (4) as follows:

> I have no doubt that, by the residual grant of jurisdictional authority in § 1581(i), *Congress intended to assure comprehensive review in this Court of a broad spectrum of administrative actions arising out of our international trade laws*, including those laws concerning the suspension or revocation of various customs licenses. Were the opposite true, it would frustrate a major Congressional goal of the Customs Courts Act of 1980 to "eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the district courts and the Court of International Trade." H.R.Rep.No.96-1235, at 47, U.S.Code Cong. & Admin.News 1980, p. 7118.
>
> Although generally, jurisdictional statutes are to be strictly construed,[FN3] *the legislative history of the residual jurisdictional provisions in section 1581(i) obviously evinces Congressional intent that these special provisions shall be accorded a broad construction*. H.R. 6394, the predecessor of H.R. 7540 (which became the Customs Courts Act of 1980), added a

> new section 1581(i) to Title 28, U.S.C., granting residual jurisdiction to this court. This section granted the Court jurisdiction over those civil actions which arise directly out of an import transaction and involve one *of the many international trade laws*. Significantly, in the proposed section 1581(i) of H.R. 7540, as amended, the specific listing of statutes in the residual provisions was eliminated *in favor of a broader "generic approach"*. Congress eschewed the listing of specific statutes in the residual provisions because it feared such listing "would result in an inadvertent omission of a statute, thereby creating further confusion in the minds of international trade law litigants". H.R.Rep.No.96-1235, 33-34, U.S.Code Cong. & Admin.News 1980, p. 7104. More, the language in proposed section 1581(i), as contained in section 201(a) of H.R. 6394, "arises directly from an import transaction", was deleted. Under proposed section 1581(i) of H.R. 7540, as amended, *"the Court of International Trade has jurisdiction over those civil actions which arise out of a law of the United States pertaining to international trade"*. H.R.Rep.No.96-1235, at 34, U.S.Code Cong. & Admin.News 1980, p. 7104.

Di Jub, *ibid.* at 1117. [Emphases added.]

Respondent omitted the above broad scope residual jurisdictional language used by Judge Newman in *Di Jub* from respondent's selected opinion-quotation at p. 11 of respondent's Brief argument. Thus the operative judicial rationale and Congressional intent as to the truly broad scope of § 1581(i)(1) jurisdictional coverage in *Di Jub* (a bonded cartman's license) was omitted from argument. Cases decided by the CIT subsequent to its 1980 *Di Jub* decision, and the CAFC's 1994 decision in *Conoco*, have effectively applied a wide scope to § 1581(i)(1) "revenue law" CIT residual jurisdiction, even if a stretch or nod to a "relates to" notion or potential effect upon revenue or tonnage was tucked into an opinion as a form of (advocated) comfort or shelter. *See such cases in petition at 22-23.* But those cases all reflect the reality that no monetary-specific claim or duty related dispute limitation is essentially required for CIT jurisdiction in administration and enforcement disputes "pertaining to international trade." Congress and the courts in turn have broadly granted § 1581(i)(1) and (4) residual basket subject matter jurisdiction for CIT judicial review of agency action on international trade subjects, including non-tariff disputes that nevertheless arise out of a law providing for revenue from imports or tonnage. No "relates to" test applies or needs any lip-service in order for CIT residual jurisdiction to obtain. See *Di Jub, Id., and related cases in petition at 22-26.*

The § 1581(i)(1) statute plainly provides jurisdiction for "any civil action...that arises out of any *law*...providing for—...revenue from imports or tonnage." [italics added]. Such a "law" is the entire

Tariff Act of 1930 (in our *Sakar* case), and indeed includes other federal international trade laws such as the Foreign Trade Zones Act of 1934, 19 U.S.C. § 81a *et seq.* (1988), that fall within the *"broad [§ 1581(i)] residual authority over civil actions arising out of federal statutes governing import transactions"* as held by the CAFC in *Conoco, ibid.* at 1588 [italics added]. The terms of the § 1581(i)(1) statute broadly provide CIT residual jurisdiction for all manner of customs and international trade cases ("In addition to" those already specified by Congress in subsections (a)-through-(h) of § 1581(i)) that lie against the United States or one of its agencies—including the present case for CIT judicial review of a final *ultra vires* Customs penalty Decision. *Sakar* thus fits properly here within the § 1581(i) jurisdiction of the national-scope CIT. Congress did not limit its § 1581(i)(1) "arises out of" subject matter jurisdiction language to any revenue-item based or monetary-claim or customs duty-collection management activity cases (or to any purported "relates to" test of same) in its statutory terms here in issue. Congress could easily have done so, but consciously did quite the opposite, as pointed out by CIT Judge Newman in *Di Jub, Id.* Congress chose instead to provide a broad residual basket of international trade subject matter jurisdiction for the CIT in § 1581(i).

Because of the unduly narrow (and erroneous we submit) restriction in its jurisdictional holding, the CAFC decision below here conflicts with the circuit's earlier 1994 decision in *Conoco*, and conflicts with Congress' "arises out of" enactment

language in the § 1581(i)(1) and (4) CIT residual international trade jurisdiction statute.

3. The CAFC rejection of the strong presumption of judicial review of agency action also conflicts with the Court's and with the DC Circuit's long standing judicial review precedents.

The CAFC's decision below conflicts with precedents of this Court and of the DC Circuit that hold a strong presumption of judicial review of agency action.

There is no merit as to respondent's contention at p. 12 of its Brief that "pre-enforcement judicial review" is sought here. A penalty collection action is for recovery of a debt. The agency's substantive HQ fictionalized-"MSRP" Penalty Decision of December 29, 2005, alleged to be *ultra vires* in this case, is different from and separable from a money-debt collection action under 28 U.S.C. § 1355 in a localized district court. National-scope CIT judicial review is warranted here as to Customs' final substantive HQ Penalty Decision in issue. Customs has exercised its 19 U.S.C. § 1526(f)(4) discretion for "imposition of a fine" in this case. The agency's December 29, 2005 HQ decision contained the agency's described "final" 30-day demand that petitioner Sakar pay the $67,775 fine. Customs stated in its December 29, 2005 Decision notice as follows: "*Please be advised that this decision constitutes the final administrative review analysis available under the provisions of Part 171 of the Customs Regulations. No further petitions will be*

accepted." CAFC A 59-61, at 59. Thus all of Customs' substantive legal deliberations in this fully briefed, twice-reviewed HQ penalty case had been completely finished and made final. Customs demanded that its penalty money be paid, and be paid quickly by petitioner Sakar within 30 days. Case finality is present here for this "administration and enforcement" action for CIT judicial review as measured under the Court's justiciability elements set out in *Bennett v. Spear*, 520 U.S. 154, 167, 117 S. Ct. 1154, 1163, 137 L. Ed. 2d 281 (1997) (final agency deliberative-decisional action on the legal merits, adverse legal injury of *ultra vires* penalty liability, redressability by judicial review and declaratory judgment relief, and ripeness for judicial review).

The Court has held in *Bowen v. Mich. Academy of Family Physicians et al.*, 476 U.S. 667, 106 S. Ct. 2133, 90 L. Ed. 2d 623 (1986) that agency action is subject to a "...strong presumption that Congress intends judicial review of administrative action," and cited *Marbury v. Madison*, 1 Cranch 137 (1803) and succeeding cases in support, 476 U.S. at 670, 106 S. Ct. at 2135-36.

The DC Circuit's decision in *Ciba-Geigy Corp. v. U.S. [EPA]*, 801 F.2d 430, 434 (D.C. Cir. 1986) applied a pragmatic balancing standard as to finality of agency action. Here, Sakar was given 30 days in which to pay up the wrongful $67,775 *ultra vires* fictionalized-MSRP Penalty fine, or to suffer[3] a consequent liability of a more than five-times-larger "full," but equally and originally *ultra vires*,

[3] *See* 19 C.F.R. § 171.22

$381,500 fictionalized-"MSRP" Penalty fine. This occurs where it is undisputed that no MSRP (nor any promulgation of any agency regulation for MSRP 'determination' basis that is specifically required by 19 U.S.C. § 1526(f)) factually exists anywhere in this case as to any goods anywhere, whether accused imported or domestic. As noted at p. 10 of the petition's statement of the case, a "... presumption of reviewability [exists], especially when the affected person is confronted with the dilemma of choosing between disadvantageous compliance or risking imposition of serious penalties." *Ciba-Geigy*, at 434. This is such a case.

The CAFC decision below is in conflict with this Court's strong presumption of judicial review of agency action reflected in *Bowen*, and is in conflict with the DC Circuit's reviewability holding in *Ciba-Geigy*.

CONCLUSION

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted:

/s/

James C. Tuttle
Counsel of Record

October 3rd, 2008

Tuttle Law Offices
82 Wall Street, Suite 1105
New York, NY 10005
Phone: 212-742-7965
Fax: 212-742-7965,
or fax: 609-924-0201
E-mail: tuttlelink@aol.com

APPENDIX

19 U.S.C. § 1526(a), (e)

(a) Except as provided in subsection (d) of this section, it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States, under the provisions of sections 81 to 109 of Title 15, and if a copy of the certificate of registration of such trademark is filed with the Secretary of the Treasury, in the manner provided in section 106 of said Title 15, unless written consent of the owner of such trademark is produced at the time of making entry.

* * *

(e) Merchandise bearing counterfeit mark; seizure and forfeiture disposition of seized goods

Any such merchandise bearing a counterfeit mark (within the meaning of section 1127 of Title 15) imported into the United States in violation of the provisions of section 1124 of Title 15, shall be seized and, in the absence of the written consent of the trademark owner, forefeited for violations of the customs laws. Upon seizure of such merchandise, the Secretary shall notify the owner of the trademark, and shall, after forfeiture, destroy the

merchandise. Alternatively, if the merchandise is not unsafe or a hazard to health, and the Secretary has the consent of the trademark owner, the Secretary may obliterate the trademark where feasible and dispose of the goods seized—

> (1) by delivery to such Federal, State, and local government agencies as in the opinion of the Secretary have a need for such merchandise,
>
> (2) by gift to such eleemosynary institutions as in the opinion of the Secretary have a need for such merchandise, or
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> (3) more than 90 days after the date of forfeiture, by sale by the Customs Service at public auction under such regulations as the Secretary prescribes, except that before making any such sale the Secretary shall determine that no Federal, State, or local government agency or eleemosynary institution has established a need for such merchandise under paragraph (1) or (2).

19 C.F.R. § 171.22

A decision to mitigate a penalty or to remit a forfeiture upon condition that a stated amount is paid will be effective for not more than 60 days from the date of notice to the petitioner of such decision unless the decision itself prescribes a different effective period. If payment of the stated amount or arrangements for such payment are not made, or a supplemental petition is not filed in accordance with

regulation, the full penalty or claim for forfeiture will be deemed applicable and will be enforced by promptly referring the matter, after required collection action, if appropriate, to the appropriate Office of the Chief Counsel for preparation for referral to the Department of Justice unless other action has been directed by the Commissioner of Customs.